Petition

81-1198

No. ———

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

STATE OF MINNESOTA,

Petitioner,

vs.

JOHN R. BLOCK, Individually and as Secretary of Agriculture of the United States, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Does the property clause of the United States Constitution authorize the federal government to regulate state-owned lands and waters to further the federal purposes for federal lands in the same vicinity?

PARTIES TO THE PROCEEDING

Additional respondents who intervened on behalf of the State of Minnesota in the district court and appealed in the state's case in the court of appeals are: Minnesota United Snowmobilers Association, Inc.; Ely-Winton Boundary Waters Conservation Alliance; Local 4757, United Steelworkers of America; Greater Virginia Area Chamber of Commerce; Crane Lake Commercial Club; Minnesota Arrowhead Association; Ely Chamber of Commerce; Carol M. Fisher; Border Lakes Association; Crane Lake Sportsmen's Club; Ash River Namakan Lake Association; Charlotte Ekroot, d/b/a Windigo Lodge; Range Actioneers, Inc.; City of Winton; National Association of Property Owners; Carl Brown, d/b/a Walleye Bait and Tackle Co.; Viking Cruises, Inc.; Concerned Citizens of Northeastern Minnesota; Boundary Waters Landowners Association, a Minnesota non-profit corporation; Koochiching County; City of South International Falls; Village of Ranier; International Falls Chamber of Commerce; and City of International Falls.

The Lac La Croix Indian Band and Ron J. Handberg, d/b/a Campbell's Cabins and Trading Post intervened on behalf of the state in the district court. They participated as *amici curiae* in the court of appeals as the Lac La Croix Indian Band and Campbell's Cabins and Trading Post, Ltd.

Additional respondents who intervened on behalf of the United States in the district court and the court of appeals are: The Sierra Club; Friends of the Boundary Waters Wilderness; Izaak Walton League of America, Inc.; League of Women Voters of Minnesota, Inc.; Minnesota Rovers; Wilderness Inquiry II; Minnesota Environmental Control Citizens' Association; Minneapolis Chapter of the National Audubon Society; St. Paul Chapter of the National Audubon Society; Duluth Chapter of the National Audubon Society; Minnesota Ornithologists' Union; and the Wilderness Society.

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Minnesota by Alexander v. Block, 660 F.2d 1240, 1244-53 (8th Cir. 1981);

National Association of Property Owners v. United States, 499 F.Supp. 1223, 1227-29, 1253-63, 1268 (D. Minn. 1980).

JURISDICTIONAL STATEMENT

This petition for writ of certiorari is for review of the judgment of the United States Court of Appeals for the Eighth Circuit entered on September 30, 1981.

Jurisdiction of the Supreme Court is conferred by Title 28, sections 1254(1) and 2101(c) of the United States Code.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions involved in this case are:

Property Clause, U.S. Const. art. IV, § 3, cl. 2

"The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State."

Tenth Amendment, U.S. Const. amend. X

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

The statutes and rules involved in this case and reproduced in the appendix are:

Act of Oct. 21, 1978, Pub. L. No. 95-495, 92 Stat. 1649-59 (BWCAW Act);

Wilderness Act, 16 U.S.C. §§ 1131-1136 (1976 & Supp. III 1979);

Minn. Stat. §§ 84.43, 84.44, 84.523, 92.45, 110.13 (1980);

6 MCAR §1.1000 (N.R. 1000).

No. ————

IN THE

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OCTOBER TERM, 1981

STATE OF MINNESOTA,

Petitioner,

vs.

JOHN R. BLOCK, Individually and as Secretary of Agriculture of the United States, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

STATEMENT OF THE CASE

The State of Minnesota brought this action to determine whether the state under its sovereign power, or the federal government under the property clause, U.S. Const. art. IV, § 3, cl. 2, controls the recreational use of a 280,000 acre state-owned and state-designated wilderness area. The action was brought in the United States District Court for Minnesota pursuant to Title 28, sections 1331(a), 2201 and 2202 of the United States Code.

The state-owned lands and waters directly involved in this case are located within the external boundaries of a one million acre area of northeastern Minnesota which

Congress has designated as the Boundary Waters Canoe Area Wilderness (BWCAW). Act of Oct. 21, 1978, Pub. L. No. 95-495, § 2, 92 Stat. 1649 (BWCAW Act).[1] Federal land comprises approximately three-fourths of the surface area within the external boundaries of the BWCAW. Most of the remaining surface area, approximately 121,000 acres of state lands and 160,000 acres of navigable waters, is owned and regulated by the state in its sovereign capacity.[2] A few tracts of land are still in private ownership.

Sections 4(c), (e), (f), (i) and 15 of the BWCAW Act, contain various provisions regulating the use of motorboats and snowmobiles in the BWCAW. Their sole purpose is to prefer one recreational use of the area over another. Nothing in the legislative history indicates any purpose to protect federal property or the environment; in fact, motorized uses are permitted on some federal lands in the BWCAW.

The United States Secretary of Agriculture (Secretary) enforces those BWCAW Act controls directly on the state-owned lands and waters as well as the federal lands. The state contends that the property clause does not authorize direct application of federal regulation to state lands and

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[1]The term "external boundaries of the BWCAW" is used in this petition because lands and waters owned by the State of Minnesota and lands owned by private persons are located within the boundaries established by section 3 of the BWCAW Act in addition to lands owned by the United States.

[2]The state's sovereign ownership of the navigable waters and their beds is well established. *Montana v. United States*, 101 S.Ct. 1245, 1251 (1981); *Kansas v. Colorado*, 206 U.S. 46, 93-95 (1907); *Pollard v. Hagan*, 44 U.S. (3 How.) 212, 229 (1845); *Martin v. Lessee of Waddell*, 41 U.S. (16 Pet.) 367, 410 (1842); *Nelson v. DeLong*, 213 Minn. 425, 431, 7 N.W.2d 342, 346 (1942). The state regulates its lands and waters within the external boundaries of the BWCAW in its sovereign capacity under express statutory direction to preserve their natural conditions for the benefit of the public. Minn. Stat. §§ 84.43-.523, 92.45, 110.13 (1980); 6 MCAR § 1.1000 (N.R. 1000).

waters and further that the tenth amendment bars such application.[8]

Upon cross motions for summary judgment, the district court determined that the property clause gave Congress authority to apply sections 4(c), (e), (f), (i) and 15 to state lands and waters and that accordingly such application was not barred by the tenth amendment. *National Association of Property Owners v. United States*, 499 F. Supp. 1223, 1259-61 (D.Minn. 1980).

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[8]In both the district court and the court of appeals, the state argued that the Secretary has construed sections 4(c), (e), (f), (i) and 15 incorrectly and that they do not apply directly to the state-owned lands and waters. The district court did not deal with the argument. The court of appeals summarily rejected the argument. *Minnesota by Alexander v. Block*, 660 F.2d 1240, 1248 n. 15 (8th Cir. 1981). Construction of the statute as applicable to federal lands only would avoid the constitutional issue of the scope of the property clause power. Two important reasons supporting the state's construction are readily apparent.

Section 4(a) requires the Secretary to "administer the wilderness under the provisions of" the BWCAW Act, the Act of January 3, 1975, Pub. L. No. 93-622, 88 Stat. 2096 and the Wilderness Act, 16 U.S.C. §§ 1131-1136 (1976 & Supp. III 1979). The Wilderness Act defines "wilderness" as "federally owned areas" and "Federal land." Wilderness Act § 2(a), (c), 16 U.S.C. § 1131(a), (c) (1976). The BWCAW Act although naming various state-owned waters refers only to the regulation of the "wilderness" in the challenged provisions. The references to specific waters are easily understood when section 7(d)(1) of the BWCAW Act is read. For the first time, Congress extended the acquisition authorities of the Thye-Blatnik Act, 16 U.S.C. § 577(c) (1976), to waters within the BWCAW area. *Compare* Act of Oct. 21, 1978, Pub. L. No. 95-495, § 7(d)(1), 92 Stat. 1654 *with* 16 U.S.C. § 577(c) (1976) (Section 577(c) by itself contains no authority to acquire waters.). Congress did not intend for the Secretary to regulate the state-owned lands and waters directly until such time as the United States acquired them and they became federally owned "wilderness."

A second important reason is that the chief Senate author of the BWCAW Act during floor action on the bill advised the Senate that the bill was not intended to change the jurisdiction of the State of Minnesota over the state's waters:

> Jurisdiction over waters is a crucial matter of concern to the State of Minnesota. The State of Minnesota, since its creation has maintained jurisdiction over all the water within its boundaries. *It is not the intent of this legislation to alter these jurisdictional rights which have been vested in the sovereign State of Minnesota.*

124 Cong. Rec. S19195 (daily ed. Oct. 14, 1978) (remarks of Sen. Anderson) (emphasis added).

The court of appeals affirmed. It held that "Congress' [property clause] power must extend to regulation of conduct on or off the public [federal] land that would threaten the designated purpose of federal lands." *Minnesota by Alexander v. Block*, 660 F.2d 1240, 1249 (8th Cir. 1981).[4] It further concluded that the tenth amendment did not bar application of sections 4(c), (e), (f), (i) and 15 to state-owned lands and waters because they "regulate only private conduct, and not the state itself." *Id.* at 1253.

Before turning to the reasons for granting certiorari, some discussion of the historical administration of the BWCAW area may be helpful to the Court. Prior to the BWCAW Act, regulation and protection of the BWCAW area had been a joint federal-state effort — an example of cooperative federalism by two sovereign property owners working together and respecting the rights of each other. The eighth circuit recognized this joint effort but downplayed the state's role. 660 F.2d at 1245 & n. 7. However, the stipulation of facts in the case, 499 F.Supp. at 1253-59, shows that the state traditionally has taken the lead in establishing state policies for the protection of the area and encouraging similar federal policies.

At the turn of the century, federal public domain lands

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[4]The court of appeals refers to the state's case as one of three consolidated cases. *Minnesota by Alexander v. Block*, 660 F.2d 1240, 1244, 1248 n. 14 (8th Cir. 1981). The issues in the other two cases involve the BWCAW Act but are different than the issues in the state's case and are not raised in this petition.

The appeals of various groups of plaintiff-intervenors in the state's case were consolidated with the state's appeal. However, to the state's knowledge, no order consolidating its case with the other two cases was ever sought or entered in the court of appeals or the district court. Rather, in both courts, the state's case was argued on the same day as the other two cases but separately from them; each court chose to issue one opinion in which it dealt with each case separately.

in northeastern Minnesota in the BWCAW area were being rapidly lost through massive land frauds. *Izaak Walton League of America v. St. Clair*, 55 F.R.D. 139 (D. Minn. 1972). In 1902, Minnesota's Chief Forest Fire Warden recommended to the Commissoner of the United States General Land Office that 500,000 acres be withdrawn from sale and placed in a federal forest reserve. These lands and others similarly withdrawn became the Superior National Forest established by proclamation of President Theodore Roosevelt in 1909.

In 1923, when lakeshore development pressures were building in the area, Minnesota prohibited the sale of and timber harvesting on state-owned lakeshore. 1923 Minn. Laws ch. 430, § 11 (codified at Minn. Stat. § 92.45 (1980)). Seven years later, Congress prohibited harvesting federal lakeshore timber. Shipstead-Nolan Act, ch. 881, § 2, 46 Stat. 1021 (1930) (codified at 16 U.S.C. § 577a (1976)). The state had urged the adoption of the Shipstead-Nolan Act. 1929 Minn. Laws Res. No. 11.

Beginning in 1925, Minnesota and Canadian officials and private individuals took the lead in opposing construction of private hydro-electric dams on border lakes now included in the BWCAW.

The state legislature first designated the area as a "wilderness area" in 1949, 1949 Minn. Laws ch. 630, § 1(2) (codified at Minn. Stat. § 84.43(2) (1980)), fifteen years before Congress adopted the Wilderness Act, Pub. L. No. 88-577, 78 Stat. 890 (1964) (codified at 16 U.S.C. §§ 1131-1136 (1976)).

The 1949 Minnesota wilderness act limited air travel in the area, and the state began prosecuting violations in August, 1949. In December, 1949, President Truman

limited air travel by presidential proclamation at the urging of Minnesota officials.

In 1976, the Minnesota legislature limited mining activities in the area, 1976 Minn. Laws ch. 322, § 1 (codified at Minn. Stat. § 84.523 (1980)), followed by Congressional enactment of mining limitations in the BWCAW Act.

An example of the state's cooperation with the federal government prior to the BWCAW Act was the state's regulation of motorboat use. Where the federal government owned all land access to a body of state water and federal regulations restricted transport of mechanized equipment across its property, the state imposed the same restrictions on water surface use. 6 MCAR § 1.1000 (N.R. 1000). Under the BWCAW Act, the federal government attempts, for the first time, to regulate directly state-owned lands and waters — not only those surrounded by federal lands, but also state-owned lands and waters that are accessible without crossing federal land. Some of the waters are directly accessible from unrestricted waters outside the BWCA boundaries both in Minnesota and Canada; some are accessible directly from state land or from state and county public roads.

REASONS FOR GRANTING THE WRIT

The property clause question decided by the eighth circuit is an important federal question which should be resolved by the Supreme Court. It impacts every state in which federal property is located. Yet, the decision is unprecedented in Supreme Court decisions.

The eighth circuit relied on language in *Kleppe v. New Mexico*, 426 U.S. 529 (1976), a case which bears no fac-

tual similarity to this case. From two carefully limited decisions, *Camfield v. United States*, 167 U.S. 518 (1897) and *United States v. Alford*, 274 U.S. 264 (1927), which allow some federal regulation of *privately owned lands* solely for the protection of *federal land*, the court of appeals has leaped to the conclusion that the property clause authorizes federal regulation of *state-owned lands and waters* for the protection of the *designated purpose of the federal land*. That conclusion is in direct conflict with the holding in *Kansas v. Colorado*, 206 U.S. 46 (1907) and the underlying premise of *Montana v. United States*, 101 S.Ct. 1245 (1981).

The eighth circuit's assertion that it is merely allowing regulation of private conduct on the state-owned lands and waters rather than regulation of the state itself is wrong. The assertion ignores the fact that the federal regulations control the state's administration of its property by restricting the uses and conduct which the state may permit or promote on its lands and waters in the exercise of its sovereign functions.

1. Misapplication of *Kleppe v. New Mexico*

The eighth circuit relied on *Kleppe v. New Mexico*, 426 U.S. 529 (1976), for "an expansive reading of Congress' power under the property clause." 660 F.2d at 1248. *Kleppe* dealt only with the exercise of property clause power *on federal land*. The state does not question, in this case, the breadth of the property clause power *on federal land* recognized in *Kleppe*. The exercise of property clause power on federal land is not the issue in this case. The issue is the exercise of that power on state-owned lands and waters.

The eighth circuit stated that it was deciding the question left open in *Kleppe*. 660 F.2d at 1248. In *Kleppe* the Court declined to decide the extent of property clause power over *private land:*

> While it is clear that regulations under the Property Clause may have some effect on *private lands* not otherwise under federal control, *Camfield v. United States*, 167 U.S. 518 (1897), we do not think it appropriate in this declaratory judgment proceeding to determine the extent, if any, to which the Property Clause empowers Congress to protect animals on private lands . . . .

426 U.S. at 546 (emphasis added). The Court did not even suggest the possibility of exercising property clause power over *state-owned lands and waters*, the subject of the eighth circuit's decision.

Kleppe provides no authority for the decision of the court of appeals in this case. The eighth circuit's reliance on the "expansive reading" of the property clause in *Kleppe* is a misapplication of *Kleppe*.

2. Improper Conclusion From *Camfield* and *Alford*

Camfield v. United States, 167 U.S. 518 (1897), and *United States v. Alford*, 274 U.S. 264 (1927), are the only Court decisions extending property clause power beyond the boundaries of federal land. *Camfield* barred fencing of private land designed for the purpose of appropriating federal land to private use by preventing access. *Alford* barred untended fires on private land that imperil federal forest land.

In both cases the Court carefully stated that the ex-

tension of property clause power beyond the boundaries was an extension to *privately owned land* solely for the *protection of federal land.* 274 U.S. at 267; 167 U.S. at 525-26. The narrowness of the extension of the power was underscored in *Camfield* when the Court acknowledged that fencing on private land for a valid private purpose would not be barred even if it had the same practical effect of preventing access to the federal land. 167 U.S. at 527-28.

The eighth circuit now holds that the property clause power may be extended to state-owned lands and waters for the protection, not of federal land, but rather of a *federal purpose.* This extension of power is allowed by the court of appeals even though it clearly interferes with a valid state purpose — the state's sovereign control of its lands and waters. The eighth circuit relies on *Camfield* and *Alford* in reaching that holding.

Given the Court's care in narrowly stating the holdings in *Camfield* and *Alford,* the Court should now consider

(1) whether the property clause power may, for the first time, be extended to *state lands and waters* as well as to private lands; and

(2) whether the property clause power may, for the first time, be extended beyond the federal land for protection of the *designated purposes for federal lands* as well as for protection of the federal land itself.

3. Conflict With *Kansas v. Colorado*

The eighth circuit's extension of *Camfield* and *Alford* conflicts with *Kansas v. Colorado,* 206 U.S. 46 (1907).

In *Kansas v. Colorado*, the Court considered whether the United States' property clause power extended to state waters adjacent to federal land. The case was initially a dispute between Kansas and Colorado over their respective citizens' use of water from the Arkansas River. The United States intervened claiming that it had the right to regulate the taking of water from the river.

The United States rested its claim on its ownership of neighboring lands:

> [The United States] rests its petition of intervention upon its alleged duty of legislating for the reclamation of arid lands; alleges that in or near the Arkansas River, as it runs through Kansas and Colorado, are large tracts of those lands; that the national government is itself the owner of many thousands of acres; that it has the right to make such legislative provisions as in its judgment is needful for reclamation of all these arid lands and for that purpose to appropriate the accessible waters.

206 U.S. at 86-87. The federal government's basic argument was that regulation of Arkansas River waters by Kansas or Colorado rather than the federal government " 'would prevent the sale. reclamation, and cultivation of the public arid lands, and defeat the policy of the Government in respect thereto.' " 206 U.S. at 87 (quoting the brief of the United States).

The issue in the present case is the same as the property clause issue in *Kansas v. Colorado*. Here, as there, the state owns the beds of waters (and also lands) which are adjacent to large tracts of federal land. The federal government seeks to control the use of the state waters and lands based on the federal government's ownership of neighboring land and its policy for the use of that land.

In its general discussion of whether the property clause was a source of power for regulating the states' waters, the Court in *Kansas v. Colorado* said the United States' power within the states is limited to the property actually owned by the United States:

> The full scope of this paragraph has never been definitely settled. Primarily, at least, it is a grant of power to the United States of control over its property. . . . *But clearly it does not grant to Congress any legislative control over the States, and must, so far as they are concerned, be limited to authority over the property belonging to the United States within their limits.*

206 U.S. at 89 (emphasis added).

The Court concluded that ownership of the riverbed gave Kansas and Colorado, rather than the federal government, control over the use of the waters in the Arkansas River: *"It is enough for the purposes of this case that each State has full jurisdiction over the lands within its borders, including the beds of streams and other waters."* 206 U.S. at 93 (emphasis added).

In this case, the court of appeals erroneously concluded that *Kansas v. Colorado* "has been greatly limited" by *Kleppe*. 660 F.2d at 1249 n. 18. This misinterpretation of *Kleppe* ignores the fact that *Kleppe* involved a narrower question: the extent of property clause power on federal land and, more specifically, whether that power extended to the protection of wildlife located on federal land. In the *Kleppe* case, New Mexico argued that protection of wildlife on federal lands exceeded the doctrine of *Kansas v. Colorado* which restricted property clause powers to the property belonging to the United States. The Court

rejected that argument, stating that the particular *Kansas v. Colorado* language, 206 U.S. at 89 (quoted *supra* at 11), relied on by New Mexico "does no more than articulate the obvious: The Property Clause is a grant of power only over federal property." 426 U.S. at 537-38. In doing so, the Court refused to accept New Mexico's argument that the *Kansas v. Colorado* language restricted the property clause power to the federal land alone and prevented federal protection of wildlife on the federal land. *Kleppe* leaves unchanged the *Kansas v. Colorado* holding that the property clause power does not extend to state waters.

The decision of the court of appeals that the property clause allows federal regulation of state lands and waters to further the federal purposes for adjacent federal land amounts to a rejection of *Kansas v. Colorado*.

4. Conflict with *Montana v. United States*

Finally, the court of appeals decision conflicts with the Court's decision in *Montana v. United States*, 101 S.Ct. 1245 (1981). This case was discussed by the state during oral argument but was ignored in the court's opinion.

In *Montana* the federal government and all other parties assumed that ownership of the riverbed determined the power to regulate recreational hunting and fishing on the Big Horn River within the borders of the Crow reservation. 101 S.Ct. at 1250 n. 1.

The federal government, the Crow Tribe and its members owned most of the land within the reservation. Federal-tribal policies for recreational use of the river were different than the state's policies.

The majority opinion held that the state owned the riverbed and had the power to regulate recreational hunting and fishing.

In discussing the importance of sovereign ownership of the beds of navigable waters, the Court said:

> [T]he ownership of land under navigable waters is an incident of sovereignty. *Martin v. Waddell*, 16 Pet. 367, 409-411, 41 U.S. 367, 409-411, 10 L.Ed. 997. As a general principle, the Federal Government holds such lands in trust for future States, to be granted to such States when they enter the Union and assume sovereignty on an "equal footing" with the established States. *Pollard's Lessee v. Hagan*, 3 How. 212, 222-223, 229, 44 U.S. 212, 222-223, 229, 11 L.Ed. 565. After a State enters the Union, title to the land is governed by state law. *The State's power over the beds of navigable waters remains subject to only one limitation: the paramount power of the United States to ensure that such waters remain free to interstate and foreign commerce.*

101 S.Ct. at 1251 (emphasis added).

The eighth circuit's holding is in direct conflict with the underlying premise of the Court's decision in *Montana*. It ignores the significance of state ownership of the beds of waters in determining the control of recreational use of the waters.

5. The Tenth Amendment Limit on the Property Clause Power

The eighth circuit circumvented the tenth amendment, U.S. Const. amend. X, issue by claiming that sections 4(c), (e), (f), (i) and 15 of the BWCAW Act regulate only the conduct of individuals and do not regulate the

state. The claim is contrary to both the effect and the language of those sections.

National League of Cities v. Usery, 426 U.S. 833. 851 (1976) recognized that the states' provision of parks and recreation for their citizens is one of their sovereign functions. Prohibition of an individual's conduct on state lands and waters (conduct which the state might legitimately choose to permit or to promote) is direct regulation of the state's administration of its property and regulates the state just as surely as if the statute said the state cannot permit or promote such conduct.

Section 15 directly prohibits state regulations "less stringent" than the federal regulations. Section 4(i) restricts use of state land and water by the state itself.

The challenged sections are an interference with the state as a sovereign. The Court should now decide

(1) whether the affirmative force of the tenth amendment recognized in *Usery* bars exercise of the property clause power on state-owned lands and waters, a question left open in *Usery*, 426 U.S. at 852 n. 17; and

(2) whether the strict standards for applying the tenth amendment limitiations on commerce power, as set forth in *Hodel v. Virginia Surface Mining and Reclamation Association, Inc.*, 101 S.Ct. 2352, 2366 (1981), are applicable to property clause power.

CONCLUSION

Minnesota is vitally concerned about its 280,000 acres of state wilderness area directly involved in this case. But the legal principles involved here extend far beyond the Boundary Waters Canoe Area.

If, as the court of appeals decided, property clause powers extend to state lands and waters to protect federal wilderness recreation purposes in the BWCAW, then those powers are equally available to protect federal park purposes, federal mining purposes, federal logging purposes, federal wildlife purposes, and every other purpose to which federal lands may be dedicated wherever those lands may be located. As a consequence the eighth circuit decision grants to Congress virtually unlimited legislative power over non-federal property, including state owned property, located in proximity to any federal land.

Minnesota is not attempting in this case to change the federal policy for the federal land in the BWCAW. It is not challenging the federal power to implement that policy on the federal property. Minnesota simply objects to federal implementation of the federal policy on the state property.

Where the federal property itself is not endangered, the property clause powers do not extend beyond the federal property. If federal purposes require extension of federal policies to the property of others, the federal government must obtain the consent of the owners of that property, or acquire the property. *See Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.*, 313 U.S. 508 (1941).

The history of the administration of the lands and waters comprising the federal and state wilderness areas known as the Boundary Waters Canoe Area provides a model of the cooperative exercise of power by the federal

and state governments to devise and implement compatible policies for their respective, neighboring properties. It serves as an illustration of the wisdom of the founding fathers who devised our federal system. History and experience demonstrate the wisdom of this Court's caution in extending the property clause power beyond the federal property. The court of appeals' decision should be reversed.

The State of Minnesota respectfully requests that this petition for a writ of certiorari be granted.

December, 1981.

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APPENDIX OF STATUTES AND RULES

Act of Oct. 21, 1978, Pub. L. No. 95-495, 92 Stat. 1649-59 (BWCAW Act)

AN ACT

To designate the Boundary Waters Canoe Area Wilderness, to establish the Boundary Waters Canoe Area Mining Protection Area, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

FINDINGS

Section 1. The Congress finds that it is necessary and desirable to provide for the protection, enhancement, and preservation of the natural values of the lakes, waterways, and associated forested areas known (before the date of enactment of this Act) as the Boundary Waters Canoe Area, and for the orderly management of public use and enjoyment of that area as wilderness, and of certain contiguous lands and waters, while at the same time protecting the special qualities of the area as a natural forest-lakeland wilderness ecosystem of major esthetic, cultural, scientific, recreational and educational value to the Nation.

PURPOSES

Sec. 2. It is the purpose of this Act to provide for such measures respecting the areas designated by this Act as the Boundary Waters Canoe Area Wilderness and Boundary Waters Canoe Area Mining Protection Area as will—

(1) provide for the protection and management of the fish and wildlife of the wilderness so as to enhance public enjoyment and appreciation of the unique biotic resources of the region,

(2) protect and enhance the natural values and environmental quality of the lakes, streams, shorelines and associated forest areas of the wilderness,

(3) maintain high water quality in such areas,

(4) minimize to the maximum extent possible, the environmental impacts associated with mineral development affecting such areas,

(5) prevent further road and commercial development and restore natural conditions to existing temporary roads in the wilderness, and

(6) provide for the orderly and equitable transition from motorized recreational uses to nonmotorized recreational uses on those lakes, streams, and portages in the wilderness where such mechanized uses are to be phased out under the provisions of this Act.

BOUNDARY WATERS CANOE AREA WILDERNESS DESIGNATION AND MAP

Sec. 3. The areas generally depicted as wilderness on the map entitled "Boundary Waters Canoe Area Wilderness and Boundary Waters Canoe Area Mining Protection Area" dated September 1978, comprising approximately one million and seventy-five thousand five hundred acres are hereby designated as the Boundary Waters Canoe Area Wilderness (hereinafter referred to as the

"wilderness"). Such designation shall supersede the designation of the Boundary Waters Canoe Area under section 3 (a) of the Wilderness Act (78 Stat. 890) and such map shall supersede the map on file pursuant to such section. The map of the wilderness shall be on file and available for public inspection in the offices of the Supervisor of the Superior National Forest and of the Chief, United States Forest Service. The Secretary of Agriculture, hereinafter referred to as "The Secretary." shall, as soon as practicable but in no event later than one year after the date of enactment of this Act, publish a detailed legal description and map showing the boundaries of the wilderness in the Federal Register. Such map and description shall be filed with the Committee on Interior and Insular Affairs of the House of Representatives and the Committee on Energy and Natural Resources of the United States Senate. Such map and description shall have the same force and effect as if included in this Act. Correction of clerical and typographical errors in such legal description and map may be made.

ADMINISTRATION

Sec. 4. (a) The Secretary shall administer the wilderness under the provisions of this Act, the Act of January 3, 1975 (88 Stat. 2096; 16 U.S.C. 1132 note), the Wilderness Act of 1964 (78 Stat. 890, 16 U.S.C. 1131-1136), and in accordance with other laws, rules and regulations generally applicable to areas designated as wilderness.

(b) Paragraph (5) of section 4 (d) of the Wilderness Act of 1964 is hereby repealed and paragraphs (6), (7),

and (8) of such section 4 (d) are hereby redesignated as paragraphs (5), (6), and (7).

(c) Effective on January 1, 1979, the use of motorboats is prohibited within the wilderness designated by this Act, and that portion within the wilderness of all lakes which are partly within the wilderness, except for the following:

(1) On the following lakes, motorboats with motors of no greater than twenty-five horsepower shall be permitted: Fall, Lake County; Newton, Lake County; Moose, Lake County; Newfound, Lake County; Sucker, Lake County; Snowbank, Lake County; East Bearskin, Cook County; South Farm, Lake County; Trout, Saint Louis County; Basswood, except that portion generally north of the narrows at the north end of Jackfish Bay and north of a point on the international boundary between Ottawa Island and Washington Island; Saganaga, Cook County, except for that portion west of American Point; *Provided:* That on the following lakes, until January 1, 1984, the horsepower limitations described in this paragraph shall not apply to towboats registered with the Secretary: Moose, Lake County; Newfound, Lake County; Sucker, Lake County; Saganaga, Cook County, as limited in this paragraph.

(2) On the following lakes and river, motorboats with motors no greater than ten horsepower shall be permitted: Clearwater, Cook County; North Fowl, Cook County: South Fowl, Cook County; Island River east of Lake Isabella, Lake County; Sea

Gull, that portion generally east of Threemile Island, Cook County; Alder, Cook County; Canoe, Cook County.

(3) On the following lakes, or specified portions of lakes, motorboats with motors of no greater than ten horsepower shall be permitted until the dates specified: Basswood River to and including Crooked Lake, Saint Louis and Lake Counties, until January 1, 1984; Carp Lake, the Knife River, and Knife Lake, Lake County, until January 1, 1984; Sea Gull, Cook County, that portion generally west of Threemile Island, until January 1, 1999; Brule, Cook County, until January 1, 1994, or until the termination of operation of any resort adjacent to Brule Lake in operation as of 1977, whichever occurs first.

(4) On the following lakes, or specified portions of lakes, motorboats with motors of no greater than twenty-five horsepower shall be permitted until January 1, 1984: Birch, Lake County; Basswood, Lake County, that portion generally north of the narrows at the north end of Jackfish Bay and north of a point on the international boundary between Ottawa Island and Washington Island.

(d) The detailed legal description and map to be published pursuant to section 3 of this Act shall contain a description of the various areas where the motorized uses permitted by this section are located. No provision of this section shall be construed to limit mechanical portages or the horsepower of motors used on motorboats in the following areas within the wilderness:

Little Vermilion Lake, Saint Louis County; Loon River, Saint Louis County; Loon Lake, Saint Louis County; that portion of the Lac La Croix, Saint Louis County, south of Snow Bay and east of Wilkins Bay.

(e) For the purposes of this Act, a snowmobile is defined as any motorized vehicle which is designed to operate on snow or ice. The use of snowmobiles in the wilderness designated by this Act is not permitted except that the Secretary may permit snowmobiles, not exceeding forty inches in width, on (1) the overland portages from Crane Lake to Little Vermillion Lake in Canada, and from Sea Gull River along the eastern portion of Saganaga Lake to Canada, and (2) on the following routes until January 1, 1984:

Vermilion Lake portage to and including Trout Lake; Moose Lake to and including Saganaga Lake via Ensign, Vera and Knife Lakes, East Bearskin Lake to and including Pine Lake via Alder Lake and Canoe Lake.

In addition to the routes listed above, the Secretary may issue special use permits for the grooming by snowmobiles of specified cross-country ski trails for day use near existing resorts.

(f) The Secretary is directed to develop and implement, as soon as practical, entry point quotas for use of motorboats within the wilderness portions of the lakes listed in subsection c, the quota levels to be based on such criteria as the size and configuration of each lake, and the amount of use on that lake: *Provided*, That the quota

established for any one year shall not exceed the average actual annual motorboat use of the calendar years 1976, 1977, and 1978 for each lake, and shall take into account the fluctuation in use during different times of the year: *Provided further,* That on each lake homeowners and their guests and resort owners and their guests on that particular lake shall have access to that particular lake and their entry shall not be counted in determining such use.

(g) Nothing in this Act shall be deemed to require the termination of the existing operation of motor vehicles to assist in the transport of boats across the portage from Sucker Lake to Basswood Lake, from Fall Lake to Basswood Lake. and from Lake Vermilion to Trout Lake, during the period ending January 1, 1984. Following said date, unless the Secretary determines that there is no feasible nonmotorized means of transporting boats across the portages to reach the lakes previously served by the portages listed above, he shall terminate all such motorized use of each portage listed above.

(h) The motorized uses authorized by this section shall be confined to those types of snowmobiles, motorboats and vehicles which have been in regular use in the Boundary Waters Canoe Area prior to the date of enactment of this Act. The Secretary may set forth additional standards and criteria to further define the type of motorized craft which may be permitted.

(i) Except for motorboats, snowmobiles, and mechanized portages, as authorized and defined herein, no other motorized use of the wilderness shall be permitted. Nothing in this Act shall prohibit the use of aircraft, motor-

boats, snowmobiles, or other mechanized uses in emergencies, or for the administration of the wilderness area by Federal, State, and local governmental officials or their deputies, only where the Secretary finds that such use is essential.

RESORTS

Sec. 5. (a) The owner of a resort in commercial operation during 1975, 1976 or 1977 and located on land riparian to any of the lakes listed below may require purchase of that resort, including land and buildings appurtenant thereto, by written notice to the Secretary prior to September 30, 1985. The value of such resort for purposes of such sale shall be based upon its fair market value as of July 1, 1978, or as of the date of said written notice, whichever is greater, without regard to restrictions imposed by this Act:

> Fall, Lake County, Moose, Lake County, Snowbank, Lake County, Lake One, Lake County, Sawbill, Cook County, Brule, Cook County, East Bearskin, Cook County, Clearwater, Cook County, Saganaga, Cook County, Sea Gull, Cook County, McFarland, Cook County, North Fowl, Cook County, South Fowl, Cook County, Jasper Lake, Lake County, Ojibway, Lake County.

(b) An owner requiring purchase of a resort under this provision may elect to retain one or more appropriate buildings and lands not exceeding three acres, for personal use as a residence: *Provided,* That the purchase price to the Government for a resort shall be reduced by the fair market value of such buildings and lands, with the same valuation procedures outlined above.

(c) With respect to any privately owned lands and interests in lands riparian to the lakes listed above, and if the Federal Government has been required to purchase a resort on said lake, said lands shall not be sold without first being offered for sale to the Secretary who shall be given a period of one hundred days after the date of each such offer within which to purchase such lands. No such lands shall be sold at a price below the price at which they have been offered for sale to the Secretary, and if such lands are reoffered for sale they shall first be reoffered to the Secretary: *Provided,* That, this right of first refusal shall not apply to a change in ownership of a property within an immediate family.

(d) There are authorized to be appropriated such sums as may be necessary for the acquisition of lands and interests therein as provided by this section.

TIMBER SALE CONTRACTS

Sec. 6. (a) The Secretary is directed to terminate within a period of one year after the date of passage of this Act, all timber sale contracts in the Boundary Waters Canoe Area Wilderness. There shall be no further logging of the virgin forest areas formerly enjoined from logging by the United States District Court on said contract areas during the termination period.

The purpose of said termination period is only to permit completion of the harvesting of timber within existing areas under contract that are not within the areas described above and permit the taking of ameliorative measures, including land and cover restoration that will, at the earliest feasible date, make the imprint of man's

work substantially unnoticeable on the lands included as wilderness in this Act.

(b) (1) In the event that termination of timber sale contracts in subsection (a) reduces the total national forest volume which a purchaser has under contract on the Superior National Forest to less than two years cut based on the average volume of Superior National Forest timber harvested by the purchaser in the last three years, the Secretary may, with the consent of the purchaser, substitute, to the extent practicable, timber on other national forest lands approximately equal in species and volume to the timber sale contract affected. In offering substitute timber, the Secretary shall negotiate the substitution at a price that is mutually equitable considering such factors as species, volume, logging accessibility, and other terms of the agreement.

(2) The United States will pay just compensation for any timber contracts terminated or modified by this Act, consistent with amendment V to the Constitution of the United States. Losses due to costs incurred in directly fulfilling the terms of such contracts shall be paid by the United States. Any action for the recovery from the United States of cost as provided above shall be brought in a court of competent jurisdiction. Any such judgments shall be paid from the claims and judgments fund (31 U.S.C. 724a).

(c) Within the limits of applicable laws and prudent forest management:

(1) the Secretary shall, in furtherance of the purposes of subsection (a) of this section and of sec-

tion 4 of the National Forest Management Act of 1976 (90 Stat. 2949), expedite the intensification of resource management including emphasis on softwood timber production and hardwood utilization on the national forest lands in Minnesota outside the wilderness to offset, to the extent feasible, the reduction in the programmed allowable timber harvest resulting from reclassification of the Boundary Waters Area, and the Secretary shall make a review of progress to date in 1983, and a forecast of planned achievements by 1985 and shall submit, as a part of the 1985 program under the schedule called for in the Resources Planning Act of 1974, a Plan and recommendations for 1985-1990. In administering the Superior National Forest, the Secretary is authorized and directed to engage in artificial and natural regeneration, release, site preparation, and other forms of timber production enhancement.

(2) The Secretary, in carrying out the requirements in section (c) (1), is authorized and directed to cooperate with the State of Minnesota and its political subdivisions to develop and implement a system of grants, for the development of renewable resources on State, County and private lands. He may also seek the cooperation of other Federal departments and agencies to assure a coordinated approach to renewable resources development.

(d) There is authorized to be appropriated, in addition to such sums as may otherwise be appropriated for the Superior National Forest from existing authorities established by law, the following additional sums for the fiscal years 1980 through 1990 inclusive:

(1) to carry out the purposes of subsection 6 (c) (1) an additional $8,000,000 anually; and,

(2) to carry out the purposes of subsection 6 (c) (2) an additional $3,000,000 annually: *Provided, however,* That the Federal share of any grant made pursuant to subsection 6 (c) (2) shall not exceed 80 percent of the total cost of said grant.

(e) Funds appropriated pursuant to this section shall remain available until expended. Authorizations in excess of funds appropriated in a given fiscal year shall remain available for appropriation in subsequent fiscal years.

(f) In addition to those personnel who would otherwise be available, the Secretary is authorized to appoint and fix the compensation (not to exceed that of grade 15 on the General Schedule for Federal employees) of additional full-time personnel for the Superior National Forest to carry out the purposes of this Act.

LAWS APPLICABLE TO CERTAIN LANDS AND WATERS IN THE SUPERIOR NATIONAL FOREST

Sec. 7. (a) The provisions of the Acts listed in paragraph (b) of this section shall continue to apply to lands and waters specified in such Acts notwithstanding the inclusion of any such lands and waters in the wilderness or mining protection area designated under this Act. For lands and waters to which such Acts listed in paragraph (b) apply which are also within the wilderness or mining protection area designated under this Act, any withdrawal, prohibition, or restriction contained in such Acts listed in paragraph (b) shall be in addition to any withdrawal, prohibition, or restriction otherwise applicable to such

wilderness or mining protection area under any other law.

(b) The Acts referred to in paragraph (a) are as follows:

(1) The Act of July 10, 1930 (46 Stat. 1020; 16 U.S.C. 577a, 577b), herein referred to as the "Shipstead-Nolan Act".

(2) The Act of June 22, 1948 (62 Stat. 568, as amended, 16 U.S.C. 577c-577b), herein referred to as the "Thye-Blatnik Act".

(c) The provisions of the Shipstead-Nolan Act are hereby extended and made applicable to all lands and waters not otherwise subject to such Act which are within the wilderness designated under this Act.

(d) (1) The authorities contained in the Thye-Blatnik Act are hereby extended and made applicable to all lands and waters not otherwise subject to such Act which are within the wilderness designated under this Act.

(2) In applying the second proviso of section 5 of such Thye-Blatnik Act to the areas to which such Act is extended and made applicable under this subsection, the phrase "fiscal year 1980" shall be substituted for the phrase "the first full fiscal year after the approval of this Act" in such proviso.

(3) There are authorized to be appropriated such sums as may be necessary to carry out the provisions of the Thye-Blatnik Act with respect to the lands and waters within the wilderness designated under this Act. Such sums may be used for the payment of court judg-

ments in condemnation actions brought under the terms of the Thye-Blatnik Act without regard to the date such condemnation actions were initially instituted. Funds appropriated from the Land and Water Conservation Fund may be used for the acquisition of any lands and waters, or interests therein within such wilderness.

EXISTING AIRSPACE RESERVATION

Sec. 8. The provisions of Executive Order 10092 as made applicable to the Boundary Waters Canoe Area established by the Wilderness Act of 1964 shall be deemed incorporated into this Act.

MINING PROTECTION AREA ESTABLISHMENT

Sec. 9. In order to protect existing natural values and high standards of environmental quality from the adverse impacts associated with mineral development there is hereby established the Boundary Waters Canoe Area Mining Protection Area (hereinafter in this Act referred to as the "mining protection area"), comprising approximately two hundred and twenty-two thousand acres.

MAP AND BOUNDARIES

Sec. 10. The mining protection area shall comprise the area generally depicted as a mining protection area on the map entitled "Boundary Waters Canoe Area Wilderness and Boundary Waters Canoe Area Mining Protection Area" dated September 1978, which shall be on file and available for public inspection in the offices of the Supervisor of the Superior National Forest and of the Chief, United States Forest Service. As soon as practicable

after this Act takes effect, the Secretary shall file a map and a legal description of the mining protection area with the Committee on Interior and Insular Affairs of the House of Representatives and the Committee on Energy and Natural Resources of the United States Senate. Such map and description shall have the same force and effect as if included in this Act. Correction of clerical and typographical errors in such description may be made.

MINING AND MINERAL LEASING IN THE WILDERNESS AND MINING PROTECTION AREA

Sec. 11. (a) In addition to any other applicable prohibition or withdrawal from entry or appropriation under any provision of the Wilderness Act or under any other provision of law, no permit, lease, or other authorization may be issued by any agency or authority of the United States for—

(1) exploration for, or mining of, minerals owned by the United States within the Boundary Waters Canoe Area Wilderness and Boundary Waters Canoe Area Mining Protection Area; or

(2) exploration for, or mining of minerals within such areas if such activities may affect navigable waters; or

(3) the use of property owned by the United States in relation to any mining of or exploration for minerals in such areas which may materially impair the wilderness qualities of the wilderness area or which may materially impair the natural values and environmental quality of the mining protection area.

The prohibitions contained in this subsection and any withdrawal from entry or appropriation for mining of or exploration for minerals applicable to the Boundary Waters Canoe Area Wilderness and Boundary Waters Canoe Area Mining Protection Area shall not apply to the extent specifically provided in legislation enacted by the United States after the date of enactment of this Act pursuant to a national emergency declared by the President.

(b) (1) Consistent with the prohibitions and other requirements in subsection (a) of this section, no permit, lease, or other authorization shall be issued unless and until—

(A) the Secretary shall have approved a plan that details how mining will be conducted consistent with this Act and with other Federal, State, and local requirements, and that details how the area will be restored to its original condition or to a substantially equivalent condition, including the estimated costs thereof;

(B) the applicant has posted a bond for performance payable to the United States in an amount determined by the Secretary to be sufficient to assure completion of the reclamation plan if the work had to be performed by the United States;

(C) the applicant shall have obtained all permits, licenses, certifications, and approvals required by Federal, State, or local law; and (iv) the Secretary has determined that no permanent facility wil be constructed nor alternation will occur

that could render the area incapable of reverting to its original condition or to a substantially equivalent condition.

(2) The provisions of paragraphs (2) and (3) of section 4(d) of the Wilderness Act (78 Stat. 890; 16 U.S.C. 1133(d)(2) and 16 U.S.C. 1133(d)(3) shall not apply to the area designated herein as the Boundary Waters Canoe Area Wilderness.

(c) The Secretary is authorized to acquire any minerals or mineral rights within the wilderness and mining protection area alleged to be owned by persons other than the Federal or State governments in the following manner:

(1) The Secretary first may seek to acquire these minerals or mineral rights by donation. In seeking a donation, the Secretary shall inform the person alleging the ownership interest of the procedures and limitations to be followed in acquisition by purchase as set forth in paragraph (2) below.

(2) If the person alleging the ownership interest does not donate his minerals or mineral rights to either the Federal or State governments, the Secretary is authorized to acquire the rights by purchase, within the limits of funds appropriated for property acquisition in the Superior National Forest, and in an amount appropriately discounted for the following factors if existent in relation to the particular mineral interest:

(A) The original patenting from the Federal public domain was fraudulent. The patenting of lands in the Boundary Waters Canoe Area Wil-

derness and Boundary Waters Canoe Area Mining Protection Area is prima facie fraudulent if (1) the Act under which the patent was issued was one of the Acts intended to put settlers on the land, such as, but without limitation, the Cash Purchase Act of 1820 (chapter LI, Act of April 24, 1820, 3 U.S. Stat. 566, 567, as amended); the Preemption Act of 1830 (chapter CCVIII, Act of May 29, 1830, 4 U.S. Stat. 420, 421, as amended); the Homestead Act of 1862 (chapter LXXV, Act of May 20, 1862, 12 U.S. Stat. 392-394, as amended); and the Timber and Stone Act (chapter 150, Act of June 3, 1878, 20 U.S. Stat. 88, 89, as amended, particularly by chapter 375, Act of August 4, 1892, 27 U.S. Stat. 348); and (2) the land was patented after 1875 and before the establishment of the Superior National Forest by proclamation on February 13, 1909. The Secretary also shall consider any other evidence of fraud when determining the value of the minerals such as (1) the transfer by the entryman or patentee of whole or partial interest in the property during the patenting process or soon thereafter, (2) the appearance in the chain of title of persons known to have participated in land speculation as land brokers, entrymen, or in other capacities.

(B) The date of separation of the mineral or mineral rights from the surface interest, if the separation occurred after 1927, the year when the courts have determined that the roadless policy was established by the Secretary for the area.

(C) Any other factor, such as restrictions on mining within the area imposed by State or local government, or by operation of treaty.

(d) In the event any legal action or proceeding is instituted by or against the United States in relation to minerals or mineral rights where the patenting is prima facie fraudulent as described in subsection (c) of this section, the Attorney General of the United States shall assert the public's equitable right to constructive or public trusts, or to recover or offset damages including but not limited to those based on the value of land fraudulently acquired plus interest at 6 per centum per annum.

(e) Not withstanding any requirement of this section, the Secretary shall have authority to acquire within the wilderness or mining protection area designated by this Act, existing mineral interests by donation, purchase, exchange, or through exercise of the power of eminent domain.

(f) There is authorized to be appropriated to the Secretary such sums as may be required to carry out the purpose of this section, to be available until expended.

SEVERABILITY

Sec. 12. If any provision of this Act is declared to be invalid, such declaration shall not affect the validity of any other provision hereof.

EXISTING STRUCTURES

Sec. 13. Nothing in this Act or the Wilderness Act shall be construed to prohibit the maintenance of the Prairie

Portage Dam (on the international boundary chain between Birch and Basswood Lakes), and the Secretary is authorized to perform such maintenance work as may be required to keep that dam functional at its present height and width. The Secretary is authorized to maintain other existing water control structures only where such structures are necessary to protect wilderness values or public safety.

JURISDICTION OVER FISH AND WILDLIFE

Sec. 14. Nothing in this Act shall be construed as affecting the jurisdiction or responsibilities of the State with respect to fish and wildlife in the wilderness and the mining protection area.

JURISDICTION OVER WATERS

Sec. 15. The Secretary is authorized to promulgate and enforce regulations that limit or prohibit the use of motorized equipment on or relating to waters located within the wilderness in accordance with the provisions of this Act: *Provided,* That nothing in this Act shall be construed as affecting the jurisdiction or responsibilities of the State with respect to such waters except to the extent that the exercise of such jurisdiction is less stringent than the Secretary's regulations promulgated pursuant to this section: *Provided further,* That any regulations adopted pursuant to this Act shall be complementary to, and not in derogation of regulations issued by the United States Coast Guard.

The Secretary is authorized to enter into cooperative agreements with the State of Minnesota with respect to enforcement of Federal and State regulations affecting the wilderness and the mining protection area.

COOPERATION WITH STATE

Sec. 16. (a) The Secretary shall cooperate with the State of Minnesota and any political subdivision thereof in the administration of the mining protection area and in the administration and protection of lands within or adjacent to the mining protection area owned or controlled by the State or any political subdivision thereof. Nothing in this title shall deprive the State of Minnesota or any political subdivision thereof of its right to exercise civil and criminal jurisdiction within the wilderness and the mining protection area and impose land use controls and environmental health standards on non-Federal areas within the wilderness and the mining protection area, or of its right to tax persons, corporations, franchises, or other non-Federal property, including mineral or other interests, in or on lands or waters within the wilderness and the mining protection area.

(b) The Secretary is authorized to enter into cooperative agreements with the State of Minnesota with respect to enforcement of Federal and State regulations affecting the wilderness and the mining protection and shall consult with the State of Minnesota in an effort to enhance the multiple-use benefits to be derived from both State and national forest lands.

TREATIES

Sec. 17. Nothing in this Act shall affect the provisions of any treaty now applicable to lands and waters which are included in the mining protection area and the wilderness.

EXPANSION OF RECREATION PROGRAMS

Sec. 18. (a) The Secretary is authorized and directed to expedite and intensify the program of dispersed outdoor recreation development on the Superior National Forest outside the Boundary Waters Canoe Area Wilderness, as designated by this Act. The Secretary shall consider in such new program development the need for the following: additional snowmobile trails, particularly those now planned or under construction; remote campsites on lightly developed lakes; and lake access sites and parking facilities to provide motorized recreation experiences similar to those previously available in the Boundary Waters Canoe Area.

(b) The Secretary, consistent with the Wilderness Act of 1964 and with this Act, is authorized to construct a system of new hiking, backpacking and cross-county ski trails within the Boundary Waters Canoe Area Wilderness as designated by this Act, and on appropriate adjacent Federal lands outside the wilderness. In constructing such a trail system, consideration should be given to locating portions of the system near existing resorts on the perimeter of the wilderness to provide additional outdoor recreation opportunities for resort guests.

(c) The Secretary is authorized and directed to develope an educational program for the recreational users of the wilderness which will assist them to understand the purpose, value, and appropriate use of wilderness lands and the functioning of natural ecosystems in wilderness.

(d) The Secretary in cooperation with the State of Minnesota and other appropriate groups, consistent with

the purposes of this Act, is authorized and directed to develope a program providing opportunities for a wide range of outdoor experiences for disabled persons.

(e) There are authorized to be appropriated such sums as may be necessary for the Secretary to carry out the purposes of this section.

Sec. 19. (a) The Secretary, in cooperation with other appropriate executive agencies, is authorized and directed to develop a cooperative program of technical and financial assistance to resorts in commercial operation in 1975, 1976, and 1977, and outfitters in commercial operation in 1977 which are located within the mining protection area or which are located on land adjacent to any of the lakes listed in section 5 of this Act. There are authorized to be appropriated such sums as may be necessary for the purposes of this subsection.

(b) There are authorized to be appropriated to the Secretary funds to be made available as grants to the Agricultural Extension Service, University of Minnesota, to provide over a three-year period educational and technical assistance to businesses and communities adjacent to the Boundary Waters Canoe Area Wilderness in order to improve economic opportunities for tourism and recreation-related businesses in a manner which is complementary to the management of the wilderness.

MANAGEMENT STUDY

Sec. 20. The Secretary, acting through the Chief, United States Forest Service, shall, not later than October 1, 1981, submit to the Committee on Interior and Insular Affairs of the House of Representatives and the

Committee on Energy and Natural Resources of the Senate, a comprehensive management plan setting forth the specific managment procedures to implement the objectives of this Act. An interim report setting forth public involvement procedures, management alternatives, and a timetable for the remaining study actions, shall be submitted within one year from the date of enactment of this Act.

LIMITATION OF AUTHORIZATIONS

Sec. 21. All authorizations for any funds to be appropriated under the terms of this Act shall not be effective until October 1, 1979. Notwithstanding any other provision of this Act, authority to enter into agreements or to make payments under this Act shall be effective only to the extent or in such amounts as are provided in advance in appropriation Acts.

Approved October 21, 1978.

Wilderness Act, 16 U.S.C. §§ 1131-1136 (1976)

(Reproduced from 16 U.S.C.S. §§ 1131-1136 (1978))

§ 1131. National Wilderness Preservation System

(a) Establishment; Congressional declaration of policy; wilderness areas; administration for public use and enjoyment, protection, preservation, and gathering and dissemination of information, provisions for designation as wilderness areas. In order to assure that an increasing population, accompanied by expanding settlement and growing mechanization, does not occupy and modify all areas within the United States and its possessions, leaving no lands designated for preservation and protection in

their natural condition, it is hereby declared to be the policy of the Congress to secure for the American people of present and future generations the benefits of an enduring resource of wilderness. For this purpose there is hereby established a National Wilderness Preservation System to be composed of federally owned areas designated by Congress as "wilderness areas", and these shall be administered for the use and enjoyment of the American people in such manner as will leave them unimpaired for future use and enjoyment as wilderness, and so as to provide for the protection of these areas, the preservation of their wilderness character, and for the gathering and dissemination of information regarding their use and enjoyment as wilderness; and no Federal lands shall be designated as "wilderness areas" except as provided for in this Act or by a subsequent Act.

(b) Management of area included in System; appropriations. The inclusion of an area in the National Wilderness Preservation System notwithstanding, the area shall continue to be managed by the Department and agency having jurisdiction thereover immediately before its inclusion in the National Wilderness Preservation System unless otherwise provided by Act of Congress. No appropriation shall be available for the payment of expenses or salaries for the administration of the National Wilderness Preservation System as a separate unit nor shall any appropriations be available for additional personnel stated as being required solely for the purpose of managing or administering areas solely because they are included within the National Wilderness Preservation System.

(c) Definition of wilderness. A wilderness, in contrast with those areas where man and his own works domi-

nate the landscape, is hereby recognized as an area where the earth and its community of life are untrammeled by man, where man himself is a visitor who does not remain. An area of wilderness is further defined to mean in this Act an area of undeveloped Federal land retaining its primeval character and influence, without permanent improvements or human habitation, which is protected and managed so as to preserve its natural conditions and which (1) generally appears to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable; (2) has outstanding opportunities for solitude or a primitive and unconfined type of recreation; (3) has at least five thousand acres of land or is of sufficient size as to make practicable its preservation and use in an unimpaired condition; and (4) may also contain ecological, geological, or other features of scientific educational, scenic, or historical value.

(Sept. 3, 1964, P. L. 88-577, § 2, 78 Stat. 890.)

§ 1132. Extent of System

(a) Designation of wilderness areas; filing of maps and descriptions with congressional committees; correction of errors; public records; availability of records in regional offices. All areas within the national forests classified at least 30 days before the effective date of this Act [enacted Sept. 3, 1964] by the Secretary of Agriculture or the Chief of the Forest Service as "wilderness" "wild", or "canoe" are hereby designated as wilderness areas. The Secretary of Agriculture shall—

(1) Within one year after the effective date of this Act [enacted Sept. 3, 1964], file a map and

legal description of each wilderness area with the Interior and Insular Affairs Committees of the United States Senate [Senate Committee on Energy and Natural Resources] and the House of Representatives, and such descriptions shall have the same force and effect as if included in this Act [16 USCA §§ 1131 et seq.]: Provided, however, That correction of clerical and typographical errors in such legal descriptions and maps may be made.

(2) Maintain, available to the public, records pertaining to said wilderness areas, including maps and legal descriptions, copies of regulations governing them, copies of public notices of, and reports submitted to Congress regarding pending additions, eliminations, or modifications. Maps, legal descriptions, and regulations pertaining to wilderness areas within their respective jurisdictions also shall be available to the public in the offices of regional foresters, national forest supervisors, and forest rangers.

(b) Review by Secretary of Agriculture of classifications as primitive areas; Presidential recommendations to Congress; approval of Congress; size of primitive areas; Gore Range-Eagles Nest Primitive Area, Colorado. The Secretary of Agriculture shall, within ten years after the enactment of this Act [enacted Sept. 3, 1964], review, as to its suitability or nonsuitability for preservation as wilderness, each area in the national forests classified on the effective date of this Act [enacted Sept. 3, 1964] by the Secretary of Agriculture or the Chief of the Forest Service as "primitive" and report his findings to the President. The President shall advise the United States Senate

and House of Representatives of his recommendations with respect to the designation as "wilderness" or other reclassification of each area on which review has been completed, together with maps and a definition of boundaries. Such advice shall be given with respect to not less than one-third of all the areas now classified as "primitive" within three years after the enactment of this Act [enacted Sept. 3, 1964], not less than two-thirds within seven years after the enactment of this Act [enacted Sept. 3, 1964], and the remaining areas within ten years after the enactment of this Act [enacted Sept. 3, 1964]. Each recommendation of the President for designation as "wilderness" shall become effective only if so provided by an Act of Congress. Areas classified as "primitive" on the effective date of this Act [enacted Sept. 3, 1964] shall continue to be administered under the rules and regulations affecting such areas on the effective date of this Act [enacted Sept. 3, 1964] until Congress has determined otherwise. Any such area may be increased in size by the President at the time he submits his recommendations to the Congress by not more than five thousand acres with no more than one thousand two hundred and eighty acres of such increase in any one compact unit; if it is proposed to increase the size of any such area by more than five thousand acres or by more than one thousand two hundred and eighty acres in any one compact unit the increase in size shall not become effective until acted upon by Congress. Nothing herein contained shall limit the President in proposing, as part of his recommendations to Congress, the alteration of existing boundaries of primitive areas or recommending the addition of any contiguous area of national forest lands predominantly of

wilderness value. Notwithstanding any other provisions of this Act [16 USCS §§ 1131 et seq.]., the Secretary of Agriculture may complete his review and delete such area as may be necessary, but not to exceed seven thousand acres, from the southern tip of the Gore Range-Eagles Nest Primitive Area, Colorado, if the Secretary determines that such action is in the public interest.

(c) Review by Secretary of Interior of roadless areas of national park system and national wildlife refuges and game ranges and suitability of areas for preservation as wilderness; authority of Secretary of Interior to maintain roadless areas in national park system unaffected. Within ten years after the effective date of this Act [enacted Sept. 3, 1964] the Secretary of the Interior shall review every roadless area of five thousand contiguous acres or more in the national parks, monuments and other units of the national park system and every such area of, and every roadless island within, the national wildlife refuges and game ranges, under his jurisdiction on the effective date of this Act [enacted Sept. 3, 1964] and shall report to the President his recommendation as to the suitability or nonsuitability of each such area or island for preservation as wilderness. The President shall advise the President of the Senate and the Speaker of the House of Representatives of his recommenation with respect to the designation as wilderness of each such area or island on which review has been completed, together with a map thereof and a definition of its boundaries. Such advice shall be given with respect to not less than one-third of the areas and islands to be reviewed under this subsection within three years after enactment of this Act [enacted

Sept. 3, 1964], not less than two-thirds within seven years of enactment of this Act [enacted Sept. 3, 1964], and the remainder within ten years of enactment of this Act [enacted Sept. 3, 1964]. A recommendation of the President for designation as wilderness shall become effective only if so provided by an Act of Congress. Nothing contained herein shall, by implication or otherwise, be construed to lessen the present statutory authority of the Secretary of the Interior with respect to the maintenance of roadless areas within units of the national park system.

(d) Conditions precedent to administrative recommendations of suitability of areas for preservation as wilderness; publication in Federal Register; public hearings; views of State, county, and Federal officials; submission of views to Congress. (1) The Secretary of Agriculture and the Secretary of the Interior shall, prior to submitting any recommendations to the President with respect to the suitability of any area for preservation as wilderness—

(A) give such public notice of the proposed action as they deem appropriate, including publication in the Federal Register and in a newspaper having general circulation in the area or areas in the vicinity of the affected land;

(B) hold a public hearing or hearings at a location or locations convenient to the area affected. The hearings shall be announced through such means as the respective Secretaries involved deem appropriate, including notices in the Federal Register and in newspapers of general circulation in the area: Provided, That if the lands involved are located in

more than one State, at least one hearing shall be held in each State in which a portion of the land lies;

(C) at least thirty days before the date of a hearing advise the Governor of each State and the governing board of each county, or in Alaska the borough, in which the lands are located, and Federal departments and agencies concerned, and invite such officials and Federal agencies to submit their views on the proposed action at the hearing or by no later than thirty days following the date of the hearing.

(2) Any views submitted to the appropriate Secretary under the provisions of (1) of this subsection with respect to any area shall be included with any recommendations to the President and to Congress with respect to such area.

(e) Modification or adjustment of boundaries; public notice and hearings; administrative and executive recommendations to Congress; approval of Congress. Any modification or adjustment of boundaries of any wilderness area shall be recommended by the appropriate Secretary after public notice of such proposal and public hearing or hearings as provided in subsection (d) of this section. The proposed modification or adjustment shall then be recommended with map and description thereof to the President. The President shall advise the United States Senate and the House of Representatives of his recommendations with respect to such modification or adjustment and such recommendations shall become effective only in the same manner as provided for in subsections (b) and (c) of this section.

(Sept. 3, 1964, P .L. 88-577, § 3, 78 Stat. 891.)

§ 1133. Use of wilderness areas

(a) Purposes of national forests, national park system, and national wildlife refuge system; other provisions applicable to national forest, Superior National Forest, and national park system. The purposes of this Act are hereby declared to be within and supplemental to the purposes for which national forests and units of the national park and national wildlife refuge systems are established and administered and—

(1) Nothing in this Act shall be deemed to be in interference with the purpose for which national forests are established as set forth in the Act of June 4, 1897 (30 Stat. 11), and the Multiple-Use Sustained-Yield Act of June 12, 1960 (74 Stat. 215).

(2) Nothing in this Act shall modify the restrictions and provisions of the Shipstead-Nolan Act (Public Law 539, Seventy-first Congress, July 10, 1930; 46 Stat. 1020), the Thye-Blatnik Act (Public Law 733, Eightieth Congress, June 22, 1948; 62 Stat. 568), and the Humphrey-Thye-Blatnik-Andresen Act (Public Law 607, Eighty-fourth Congress, June 22, 1956; 70 Stat. 326), as applying to the Superior National Forest or the regulations of the Secretary of Agriculture.

(3) Nothing in this Act shall modify the statutory authority under which units of the national park system are created. Further, the designation of any area of any park, monument, or other unit of the national park system as a wilderness area pursuant

to this Act shall in no manner lower the standards evolved for the use and preservation of such park, monument, or other unit of the national park system in accordance with the Act of August 25, 1916 [16 USCS §§ 1 et seq.], the statutory authority under which the area was created, or any other Act of Congress which might pertain to or affect such area, including, but not limited to, the Act of June 8, 1906 (34 Stat. 225; 16 U.S.C. 432 et seq.); section 3(2) of the Federal Power Act (16 U.S.C. 796(2)) [16 USCS § 796(2)]; and the Act of August 21, 1935 (49 Stat. 666; 16 U.S.C. 461 et seq.).

(b) Agency responsibility for preservation and administration to preserve wilderness character; public purposes of wilderness areas. Except as otherwise provided in this Act, each agency administering any area designated as wilderness shall be responsible for preserving the wilderness character of the area and shall so administer such area for such other purposes for which it may have been established as also to preserve its wilderness character. Except as otherwise provided in this Act, wilderness areas shall be devoted to the public purposes of recreational, scenic, scientific, educational, conservation, and historical use.

(c) Prohibition provisions: commercial enterprise, permanent or temporary roads, mechanical transports, and structures or installations; exceptions: area administration and personal health and safety emergencies. Except as specifically provided for in this Act, and subject to existing private rights, there shall be no commercial enterprise and no permanent road within any wilderness area desig-

nated by this Act and, except as necessary to meet minimum requirements for the administration of the area for the purpose of this Act (including measures required in emergencies involving the health and safety of persons within the area), there shall be no temporary road, no use of motor vehicles, motorized equipment or motorboats, no landing of aircraft, no other form of mechanical transport, and no structure or installation within any such area.

(d) Special provisions. The following special provisions are hereby made:

(1) Aircraft or motorboats; fire, insects, and diseases. Within wilderness areas designated by this Act the use of aircraft or motorboats, where these uses have already become established, may be permitted to continue subject to such restrictions as the Secretary of Agriculture deems desirable. In addition, such measures may be taken as may be necessary in the control of fire, insects, and diseases, subject to such conditions as the Secretary deems desirable.

(2) Mineral activities, surveys for mineral value. Nothing in this Act shall prevent within national forest wilderness areas any activity, including prospecting, for the purpose of gathering information about mineral or other resources, if such activity is carried on in a manner compatible with the preservation of the wilderness environment. Furthermore, in accordance with such program as the Secretary of the Interior shall develop and conduct in consultation with the Secretary of Agriculture, such areas shall be surveyed on a planned, recurring basis consistent with the concept of wilderness preservation by the Geological Survey and the Bureau of Mines to determine

the mnieral values, if any, that may be present; and the results of such surveys shall be made available to the public and submitted to the President and Congress.

(3) Mining and mineral leasing laws; leases, permits, and licenses; withdrawal of minerals from appropriation and disposition. Notwithstanding any other provisions of this Act, until midnight December 31, 1983, the United States mining laws and all laws pertaining to mineral leasing shall, to the same extent as applicable prior to the effective date of this Act [enacted Sept. 3, 1964], extend to those national forest lands designated by this Act as "wilderness areas"; subject, however, to such reasonable regulations governing ingress and egress as may be prescribed by the Secretary of Agriculture consistent with the use of the land for mineral location and development and exploration, drilling, and production, and use of land for transmission lines, waterlines, telephone lines, or facilities necessary in exploring, drilling, producing, mining, and processing operations, including where essential the use of mechanized ground or air equipment and restoration as near as practicable of the surface of the land disturbed in performing prospecting, location, and, in oil and gas leasing, discovery work, exploration, drilling, and production, as soon as they have served their purpose. Mining locations lying within the boundaries of said wilderness areas shall be held and used solely for mining or processing operations and uses reasonably incident thereto; and hereafter, subject to valid existing rights, all patents issued under the mining laws of the United States affecting national forest lands designated by this Act as wilderness areas shall convey title to the mineral deposits within the claim, together with the right to cut and use so much of

the mature timber therefrom as may be needed in the extraction, removal, and beneficiation of the mineral deposits, if needed timber is not otherwise reasonably available, and if the timber is cut under sound principles of forest management as defined by the national forest rules and regulations, but each such patent shall reserve to the United States all title in or to the surface of the lands and products thereof, and no use of the surface of the claim or the resources therefrom not reasonably required for carrying on mining or prospecting shall be allowed except as otherwise expressly provided in this Act: Provided, That, unless hereafter specifically authorized, no patent within wilderness areas designated by this Act shall issue after December 31, 1983, except for the valid claims existing on or before December 31, 1983. Mining claims located after the effective date of this Act [enacted Sept. 3, 1964] within the boundaries of wilderness areas designated by this Act shall create no rights in excess of those rights which may be patented under the provisions of this subsection. Mineral leases, permits, and licenses covering lands within national forest wilderness areas designated by this Act shall contain such reasonable stipulations as may be prescribed by the Secretary of Agriculture for the protection of the wilderness character of the land consistent with the use of the land for the purposes for which they are leased, permitted, or licensed. Subject to valid rights then existing, effective January 1, 1984, the minerals in lands designated by this Act as wilderness areas are withdrawn from all forms of appropriation under the mining laws and from disposition under all laws pertaining to mineral leasing and all amendments thereto.

(4) Water resources, reservoirs, and other facilities; grazing. Within wilderness areas in the national forests designated by this Act (1) the President may, within a specific area and in accordance with such regulations as he may deem desirable, authorize prospecting for water resources, the establishment and maintenance of reservoirs, water-conservation works, power projects, transmission lines, and other facilities needed in the public interest, including the road construction and maintenance essential to development and use thereof, upon his determination that such use or uses in the specific area will better serve the interests of the United States and the people thereof than will its denial; and (2) the grazing of livestock, where established prior to the effective date of this Act [enacted Sept. 3, 1964], shall be permitted to continue subject to such reasonable regulations as are deemed necessary by the Secretary of Agriculture.

(5) Management of Boundary Waters Canoe Area, Superior National Forest, Minnesota; motorboats Other provisions of this Act to the contrary notwithstanding, the management of the Boundary Waters Canoe Area, formerly designated as the Superior, Little Indian Sioux, and Caribou Roadless Areas, in the Superior National Forest, Minnesota, shall be in accordance with regulations established by the Secretary of Agriculture in accordance with the general purpose of maintaining, without unnecessary restrictions on other uses, including that of timber, the primitive character of the area, particularly in the vicinity of lakes, streams, and portages: Provided, That nothing in this Act shall preclude the continuance within the area of any already established use of motorboats.

* (5) (6) Commercial services. Commercial services may be performed within the wilderness areas designated by this Act to the extent necessary for activities which are proper for realizing the recreational or other wilderness purposes of the areas.

* (6) (7) State water laws exemption. Nothing in this Act shall constitute an express or implied claim or denial on the part of the Federal Government as to exemption from State water laws.

* (7) (8) State jurisdiction of wildlife and fish in national forests. Nothing in this Act shall be construed as affecting the jurisdiction or responsibilities of the several States with respect to wildlife and fish in the national forests.

(Sept. 3, 1964, P. L. 88-577, § 4, 78 Stat. 893).

§ 1134. State and private lands within wilderness areas

(a) Access; exchange of lands; mineral interests restriction. In any case where State-owned or privately owned land is completely surrounded by national forest lands within areas designated by this Act as wilderness, such State or private owner shall be given such rights as may be necessary to assure adequate access to such State-owned or privately owned land by such State or private owner and their successors in interest, or the State-owned land or privately owned land shall be exchanged for federally owned land in the same State of approximately equal value under authorities available to the Secretary of Agriculture:

*Section 4(b) of Public Law 95-495 repealed paragraph (5) section 4 (d) of the Wilderness Act, 16 U.S.C. 1133(d)(5) (1976) and renumbered paragraphs (6)-(8) to paragraphs (5)-(7).

Provided, however, That the United States shall not transfer to a State or private owner any mineral interests unless the State or private owners relinquishes or causes to be relinquished to the Unitetd States the mineral interest in the surrounded land.

(b) Customary means for ingress and egress to wilderness areas subject to mining claims or other occupancies. In any case where valid mining claims or other valid occupancies are wholly within a designated national forest wilderness area, the Secretary of Agriculture shall, by reasonable regulations consistent with the preservation of the area as wilderness, permit ingress and egress to such surrounded areas by means which have been or are being customarily enjoyed with respect to other such areas similarly situated.

(c) Acquisition of lands. Subject to the appropriation of funds by Congress, the Secretary of Agriculture is authorized to acquire privately owned land within the perimeter of any area designated by this Act as wilderness if (1) the owner concurs in such acquisition or (2) the acquisition is specifically authorized by Congress.

(Sept. 3, 1964, P. L. 88-577, § 5, 78 Stat. 896.)

§ 1135. Gift, bequests, and contributions

(a) The Secretary of Agriculture may accept gifts or bequests of land within wilderness areas designated by this Act for preservation as wilderness. The Secretary of Agriculture may also accept gifts or bequests of land adjacent to wilderness areas designated by this Act for preservation as wilderness if he has given sixty days advance notice thereof to the President of the Senate and the Speaker of

the House of Representatives. Land accepted by the Secretary of Agriculture under this section shall become part of the wilderness area involved. Regulations with regard to any such land may be in accordance with such agreements, consistent with the policy of this Act, as are made at this time of such gift, or such conditions, consistent with such policy, as may be included in, and accepted with, such bequest.

(b) The Secretary of Agriculture or the Secretary of the Interior is authorized to accept private contributions and gifts to be used to further the purposes of this Act.

(Sept. 3, 1964. P.L. 88-577, §6, 78 Stat. 896.)

§ 1136. Annual reports to Congress

At the opening of each session of Congress, the Secretaries of Agriculture and Interior shall jointly report to the President for transmission to Congress on the status of the wilderness system, including a list and description of the areas in the system, regulations in effect, and other pertinent information, together with any recommendations they may care to make.

(Sept. 3, 1964, P. L. 88-577, § 7, 78 Stat. 896.)

Minn. Stat. § 84.43 (1980)

84.43 DEFINITIONS. Subdivision 1. The definitions given in this section shall govern for the purposes of sections 84.43 to 84.52 unless a different meaning is clearly indicated by the language or context.

Subd. 2. "Wilderness Area" shall mean any of the following areas or parts thereof:

(1) All those portions of the Superior National Forest described in Section 2 of Public Law 733, 80th Congress, approved June 22, 1948, and all public waters included therein or bordering thereon except the following: Crane Lake, Moose Lake in Township 64 North, Range 9 West, Snow Bank Lake, Sawbill Lake, Brule Lake, Big Lake in Townships 64 and 65 North, Range 13 West, Saganaga Lake, Seagull Lake, Clearwater Lake in Township 65 North, Range 1 East, and East Bearskin Lake in Township 64 North, Range 1 East and Range 1 West:

(2) Such other areas as may be designated by the commissioner of natural resources as hereinafter provided within the present boundaries of the Superior National Forest and the Kabetogama and Pigeon River purchase units thereof as heretofore established by federal authority and not less than five miles from any public highway.

Subd. 3. "Public waters" shall mean all waters lying wholly within the state and all portions of boundary waters within the jurisdiction of the state contained within any wilderness areas designated hereunder and which the public have a right to use for navigation, fishing, hunting or any other beneficial public use.

Subd. 4. "Aircraft" shall mean any contrivance now known or hereafter invented and used or designed for navigation or flight in the air.

[*1949 c. 630 s 1; 1969 c 1129 art 10 s 2*]

Minn. Stat. §84.44 (1980)

84.44 DECLARATION OF POLICY. It is hereby declared that regulation and control of the operation of air-

craft and watercraft upon or over any wilderness area and public waters therein is necessary for the protection and promotion of public health, safety and welfare and other interests of the public therein and for the protection and conservation of natural wilderness conditions and other natural resources therein for the public benefit.

[*1949 c 630 s 2*]

* * *

Minn. Stat. § 84.523 (1980)

84.523 BWCA; MANAGEMENT OF MINERALS AND RELATED RESOURCES. Subdivision 1. Definition. For the purpose of this section, the term "boundary waters canoe area" means that area of lands and waters included within the boundaries designated in federal regulation REG. U-3, 36 Code of Federal Regulations 293.16, as that regulation provided on January 1, 1975.

Subd. 2. Intent. The legislature finds that a combination of state legislative and administrative actions and court decisions have established a public policy of primarily wilderness management for state land and waters within the boundary waters canoe area. This state policy, together with a similar federal policy and international actions consistent with these state and federal policies, has created an area of hundreds of thousands of acres of land and water containing myriad lakes and streams, wooded shores, virgin forests, and other natural attractions of surpassing scenic beauty and solitude, free from substantially all commercial activities and artificial development such as hydroelectric dams and power lines, resorts, roads, sawmills, and timber harvesting in no-cut zones.

Subd. 3. Mining; prohibition. Except with the prior approval of the legislature in those cases of national emergency which have been declared by the Congress and which direct the need for exploration and mining of federal lands within the boundary waters canoe area, and after an investigation and determination by the commissioner of natural resources pursuant to subdivision 5 no state owned or administered land may be leased for exploration or mining of minerals, and no state permits, licenses or leases shall be issued to use any other state natural resources for any mineral exploration or mining operations in the boundary waters canoe area.

Subd. 4. Peat harvesting; prohibition. Except with prior approval of the legislature in those cases of national emergency which have been declared by the Congress and which direct the need for exploitation of peat deposits on federal land within the boundary waters canoe area, and after an investigation and determination by the commissioner of natural resources pursuant to subdivision 5 no state owned or administered land may be leased for the purpose of harvesting peat, and no state permits, licenses or leases shall be issued to use any other state natural resources for the purpose of harvesting peat in the boundary waters canoe area.

Subd. 5. Investigation and determination. In the event of a national emergency declared by Congress which requires, for the protection of national interests, exploitation of natural resources of the type found in the boundary waters canoe area, the commissioner of natural resources shall investigate and determine if there are reasonable alternative methods for providing the needed resources. If

the investigation shows there are reasonable alternatives to exploitation of natural resources in the area, no permit for development shall be issued. If the commissioner of natural resources determines there is a need to provide resources from within the boundary waters canoe area, and that there is no reasonable alternative available to meet the need, a permit may be issued upon approval by the state legislature.

[*1976 c. 332 s 1*]

Minn. Stat. § 92.45 (1980)

92.45 STATE LAND ON MEANDERED LAKES WITHDRAWN FROM SALE; EXCEPTION. All state lands bordering on or adjacent to meandered lakes and other public waters and watercourses and the live timber growing or being thereon hereby are withdrawn from sale except as hereinafter provided. The commissioner of natural resources may sell any such timber as otherwise provided by law for cutting and removal under such conditions as he shall prescribe in accordance with approved, sustained-yield forestry practices. He shall reserve such timber and impose such other conditions as he deems necessary for the protection of watersheds, wildlife habitat, shorelines, and scenic features. Within the area in Cook, Lake, and St. Louis counties described in the Act of Congress approved July 10, 1930. (46 Stat. 1020), the timber on state lands shall be subject to like restricions as are now imposed by said act on federal lands.

Of all such land bordering on or adjacent to meandered lakes and other public waters and watercourses and so withdrawn from sale, a strip two rods in width, the ordi-

nary high-water mark being the water side boundary thereof, and the land-side boundary thereof being a line drawn parallel to the ordinary high-water mark and two rods distant landward therefrom, hereby is reserved for public travel thereon, and wherever the conformation of the shore line or conditions require, the commissioner shall reserve a wider strip for such purposes.

Any such state lands bordering on or adjacent to the Mississippi River or any such lakes, waters, and watercourses in the bottom lands thereof, desired or needed by the United States government for, or in connection with, any project theretofore authorized by Congress for the improvement of navigation in the Mississippi River, may be sold by the commissioner at public sale according to law, as in other cases, upon application by a fully authorized United States official, setting forth a description of the land and transmitted with a map showing its location with reference to adjoining properties.

[1923 c 430 § 11; 1927 c 330 s 1; 1929 c 21 s 1; 1951 c 20 s 1; 1969 c 1129 art 10 § 2] (6463)

Minn. Stat. § 110.13 (1980)

110.13 CONTROL OF SHORE LINES; VIOLATION. In order to preserve shorelines, rapids, water falls, beaches, and other natural features in an unmodified state of nature, no dam and no addition to any existing dam shall hereafter be constructed in or across any public stream or body of water within or bordering upon those portions of the area of Cook, Lake, and St. Louis counties designated in the act of congress of July 10, 1930 (Chapter 880), and no alteration of the natural water level

or volume of flowage of any such stream or body of water shall be made and no easement for flooding or overflowing or otherwise affecting lands of the state of Minnesota adjacent thereto shall be granted, unless and until specific authority shall have first been obtained by an act of the legislature. With the written approval and consent of the department of natural resources, together with the signed authority of the executive council, dams for public recreational uses or dams essential for logging or for logging reservoirs that do not exceed 100 acres in extent may be constructed to maintain temporarily water levels not higher than the normal highwater marks. Every such approval shall be subject to suitable charges, time limitation, and other conditions designed fully to protect the public interest in the intent of this section. The provisions of this section shall not apply to that portion of any proposed development for water-power purposes now or heretofore actually occupied and maintained by any applicant for license to make such development under the terms of the federal water power act if the application for such license was spending on or before January 1, 1928. Such occupancy is hereby legalized and confirmed and such occupant is hereby granted the right to occupy and use for water-power purposes, and so long as required and used for such purposes, the state lands and water now or heretofore so occupied and used up to an elevation not exceeding two feet above the lowest crest of the spillway or overflow dam of such occupant as now constructed, provided, that no water control structures shall be used higher than those now or heretofore used. The occupant shall pay to the state annually reasonable compensation for the use of the state lands affected, to be determined by the commis-

sioner of natural resources after investigation. The occupant shall comply with the following requirement:

To pay the state promptly reasonable compensation for any further damage to state lands or timber heretofore or hereafter caused by such development, other than such as is covered by the compensation paid for the use of the lands as hereinbefore provided.

Any person who shall wilfully or knowingly violate any of this section or of any order made thereunder by the department of natural resources shall be guilty of a gross misdemeanor.

[*1933 c 412 s. 1,2; 1969 c 1129 art 3 s 1*] *(6602-2, 6692-3)*

6 MCAR § 1.1000 (N.R. 1000)

DEPARTMENT OF NATURAL RESOURCES*

CHAPTER TWENTY-ONE: BOUNDARY WATERS CANOE AREA

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NR 1001-1099 Reserved for Future Use.

Filed with Secretary of State and Commissioner of Administration December 31, 1970

*(The Department of Conservation was renamed Department of Natural Resources by Laws 1969, Chapter 1129, Article 3.)

STATE OF MINNESOTA
DEPARTMENT OF NATURAL RESOURCES
RULES AND REGULATIONS

CHAPTER TWENTY-ONE: BOUNDARY WATERS CANOE AREA

NR 1000 Use of State Lands and Waters Within the Boundary Waters Canoe Area(BWCA).

(a) Statement of Purpose and Scope

The purpose of this rule is to regulate use so as to maintain the primitive wilderness character of the area, particularly the lakes and streams and the lands in the vicinity of the lakes, streams and portages in a manner which takes into account state laws and administrative and judicial actions and the federal regulation, 36 CFR, Section 251.85, dated December 15, 1965, and accompanying Administrative Guides of the Chief of the Forest Service, governing the federal land in the area. The lands and rights owned on the effective date of this rule or thereafter acquired by the State of Minnesota and administered by the Commissioner of Natural Resources and the waters of the state within, or substantially within, the Boundary Waters Canoe Area (BWCA) in the Superior National Forest, Minnesota, as formerly designated under REG U-3 (36 CFR 251.22) and incorporated into the National Wilderness Preservation System under the Wilderness Act of September 3, 1964, shall be administered in accordance with this rule. (See Appendix A, Map of the Boundary Waters Canoe Area for the boundaries of the BWCA, the "portal" zone, the "no cut" zone, and motorized routes.)

(b) Use of State Lands

(1) Campsites

(aa) Every person camping on state land shall maintain the site in a clean fashion. Human waste facilities shall be used when provided. If none is provided, campers and other users shall relieve themselves at least one hundred (100) feet from the shore. Disposal of human wastes in or on public waters of the state is prohibited at all times of the year. Upon vacating the site, each camper shall restore the site as nearly as possible to its natural condition. No new compsite shall be established, other than by the Department of Natural Resources, by cutting live trees.

GENERAL PROHIBITION:

(bb) No person traveling over or using state lands or waters within the BWCA shall have in his possession any nonburnable food or beverage containers which are not designed and intended for reuse or which have little or no commodity value for reuse, including containers on which deposits are commonly charged by vendors.

RESERVED RIGHTS HOLDERS' EXCEPTION:

These prohibitions shall not apply until January 1, 1976, to a holder of rights reserved by a grantor in a conveyance to the United States to occupy and use the surface of a tract of land for residential, scientific, educational, or other noncommercial purposes, while the holder of these rights or his agent is traveling to or from such a tract over state lands or waters on a route previously approved in writing by the commissioner.

COMMISSIONER'S APPROVAL AFTER 1975:

On and after January 1, 1976, and until January 1, 1986, the prohibitions contained above in this paragraph (bb) shall not apply to a holder of such rights who has obtained this written approval from the commissioner previous to January 1, 1976 unless the commissioner terminates his previous approval after making written findings that damage to the primitive wilderness character of the BWCA is greater than any benefits which may result from the authorization previously granted.

PROCEDURE FOR REVOCATION OF HOLDER'S APPROVAL:

Before making any such written findings, the commissioner shall give at least 30 days written notice of his intended action to the holder.

CANADIAN CABIN OWNER'S EXCEPTION:

The prohibitions contained above in this paragraph (bb) also shall not apply to an owner or lessee of a noncommercial residential dwelling in Canada while traveling to or from his dwelling site across state lands and waters on a route previously approved in writing by the commissioner. The commissioner's approval shall be limited to foods and beverages for the owner's or lessee's own consumption. The commissioner may terminate his previous approval after making written findings that damage to the primitive wilderness character of the BWCA is greater than any benefits which may result from the authorization previously granted or for other good cause.

PROCEDURE FOR REVOCATION OF CABIN OWNER'S APPROVAL:

Before making any such written findings, the commissioner shall give at least 30 days written notice of his intended action to the owner or lessee.

LESSEES ON STATE PORTAGES

The prohibitions contained above in this paragraph (bb) also shall not apply to a lessee of the state who operates a mechanical portage on state land at the Loon River or Beatty portages while the lessee is on the leased state land and while traveling to and from the leased state land across state lands or waters on a route previously approved in writing by the commissioner. The commissioner's written approval shall terminate with the termination of the lease, unless previously terminated in writing by the commissioner, and shall be limited to foods and beverages for the lessee's own consumption.

NON-PROHIBITED CONTAINERS:

Except as previously prohibited by this paragraph (bb), food and beverage containers specifically designed and intended for reuse are allowable. All containers, food, equipment, and other objects brought into the BWCA shall be packed out if not completely burned unless the objects are retained on lands of a holder of reserved rights or a lessee of the State by the holder or lessee. No containers, food, equipment, or other objects of any kind shall be deposited on or buried in state lands or waters in the BWCA except as may be authorized to be buried on state land by a lessee of the state. Every person camping in the

BWCA shall be responsible for any such trash or litter deposited on or buried at the campsite whether or not by that person.

The Commissioner of Natural Resources shall cooperate fully with federal authorities and private parties in providing suitable trash and refuse collection facilities at major entrance and exit points to and from the BWCA.

(cc) Campsites may be closed to all use and so posted when necessary for site restoration or other reasons. Campsites may be closed to overnight use but remain open for daytime use and so posted. Such postings shall be honored.

(dd) Where fireplaces are provided fires shall be made in them only. In all other cases, fires shall be made on a place containing a maximum amount of inorganic matter, such as rock, sand or gravel. All fires left unattended must be thoroughly extinguished, preferably with water. No living trees or branches shall be cut for firewood. Dead branches removed from living trees must be cut close to the trunk of the tree.

(ee) In addition to penalties otherwise provided, any person whose campsite is found to contain physical evidence that paragraph (b)(1) of this Rule has been violated or is found violating paragrah (b)(2) of this Rule, may be denied continued use and enjoyment of the BWCA. Such person may be ordered to return on his own power to his point of entry by the most direct route and within a specified time, and shall be denied use of the BWCA for 30 days thereafter. Failure to present a copy of the order to leave the BWCA to a State Conservation Oficer in Ely or Grand Marais within twenty-four hours of the time specified shall constitute a separate offense.

(ff) No permanent or semi-permanent camps or structures may be erected on state land or water except as necessary for law enforcement and administration of natural resources in the area, except in the portal zone established by 36 CFR 251.85 (a)(2) dated December 15, 1965, for harvest and removal of forest products, and except for fish houses, but in no case shall fish houses be allowed after February 28, 1973. (See Appendix A, Map of the BWCA.) Each camp shall be provided by or for specific users and shall not be maintained for successive use by a series of campers. All equipment and camping gear must be removed from the BWCA at the end of each current visit.

(2) Use, Transportation and Storage of Equipment

(aa) All roads and all forms of mechanical transport including but not limited to motors, snowmobiles and all-terrain vehicles and all mechanized equipment are prohibited except as provided in this paragraph and except as provided in this paragraph and except as provided by 36 CFR 251.85, dated December 15, 1965, and accompanying administrative guides. Any such transport or equipment found unattended on state land or water shall be removed at the owner's expense. If not claimed and payment of expenses offered within a reasonable time, it shall be disposed of under state laws governing abandoned property.

Watercraft equipped with motors capable of propelling the watercraft, and motor driven ice and snow craft are permitted over the following designated routes, which are the same as provided in 36 CFR 251.85 (b) (4) (a) and (b) (7) (a):

i. International Boundary Route, including the portages commonly used in traversing the International Boundary as provided for in the Webster-Ashburton Treaty.

ii. Sioux River Route to Loon Lake by way of Little Indian Sioux River, and the Pauness Lakes.

iii Moose River Route to Lac La Croix by way of Moose River, Nina Moose Lake, Lake Agnes, and the Boulder River.

iv. Trout Lake Route by way of Trout Lake and Oriniack Lake, including the Pine Lake Loop.

v. Pipestone Bay Route to Basswood Lake by way of Newton Lake.

vi. Four Mile Portage Route to Basswood Lake, including Mud Lake and Ella Hall Lake.

vii. The Wind Lake Route to Basswood Lake by way of Wind Lake and Wind Bay.

viii. Ensign Lake Route to Thomas Lake by way of Newfound Lake, Ensign Lake, Ashigan Lake, Gibson Lake, Cattyman Lake, Jordan Lake, Ima Lake and Hatchet Lake, including branch routes by way of Vera Lake to Knife Lake and from Snowbank Lake to Cattyman Lake by way of Parent Lake and Disappointment Lake.

ix. Lake Insula Route to Thomas Lake by way of Lakes One, Two, Three, and Four, Hudson Lake, Lake Insula, and Kiana Lake, including the route to Alice Lake from Lake Insula by way of the Kawishiwi River.

x. South Kawishiwi River Route from Birch Lake to the Kawishiwi River, with connecting link by way of Clear Lake.

xi. Bald Eagle Route from South Kawishiwi River by way of Gabbro Lake to Bald Eagle Lake.

xii. Smoke Lake Route from Sawbill Lake by way of Smoke Lake, Flame Lake, Burnt Lake, Kelly Lake, Peterson Lake, and Baker Lake.

xiii. Cherokee Route from Sawbill Lake to Brule Lake by way of Ada Creek, Ada Lake, Cherokee Lake, North Temperance Lake and South Temperance Lake.

xiv. Brule Lake Route from Peterson Lake to Poplar Lake by way of Kelly Lake, Jack Lake, Weird Lake, South Temperance Lake, Brule Lake, the Cone Lakes, Cliff Lake, Wanihigan Lake, Winchell Lake, Gaskin Lake, Horseshoe Lake, Caribou Lake, and Lizz Lake.

xv. Tuscarora Lake Route from Round Lake to Tuscarora Lake by way of Missing Link Lake, or direct.

xvi. Red Rock Lake Route from Sea Gull Lake to Saganaga Lake by way of the Alpine Lake and Red Rock Lake.

xvii. Clearwater Lake—Mountain Lake Route.

xviii. East Bearskin—Pine Lake Route by way of Alder Lake and Canoe Lake.

xix. Hog Creek Route to Perent Lake.

In addition, motor driven ice and snow craft only are permitted over the following designated routes, which are the same as those provided in 36 CFR 251.85(b)(7)(a):

i. Crane Lake—Little Vermilion Lake Winter Portage.

ii. Sagana Lake Winter Portage in Sections 18-19, T. 66 N., R. 4 W.

Use of ice and snow craft is authorized only during the period November 1 to April 15, and when the ground is covered with snow.

(bb) No motor or other mechanical device capable of propelling a watercraft through water, boat or other watercraft, equipment or dock may be transported over or stored on or moored to state land administered by the Commissioner and left unattended except on routes designated in paragraph (aa) above, and then only during the course of a current visit. Boats and motors may be stored on sites approved by the Commissioner pursuant to permits issued by the Commissioner to persons who before the effective date of these rules, have stored boats on state water or lands administered by the Commissioner in connection with commercial services. All such permits shall terminate no later than November 15, 1973, shall not be assigned without the consent of the Commissioner, and be nonrenewable. The terms of such permits shall be established by the Commissioner in a way to maximize the maintenance of the primitive wilderness character of the area. Each permit shall be numbered, which number shall be affixed in the same general place as the boat registration number, shall be for the storage of one boat and motor, if any, and shall authorize use of that boat and motor, if any, on the body of water adjoining the storage area, and any motor route adjoining the storage area. Each permit shall specify the precise location within which each boat and motor, if any, may be stored and used. The quantity of such permits shall be limited to the number of applications made, but in no case shall exceed fifty (50). Each application for a permit shall be accompanied by a sworn affidavit that the specific boat for

which a permit is sought has been stored on or near the body of water adjoining the permit location requested. If more than fifty (50) applications are submitted, the Commissioner shall encourage joint use applications. The Commissioner may charge a reasonable fee for the permit and may provide for permit termination for violation of the permit terms, particularly boat use location. Canoes and camping equipment may be stored at the head of an overland trail during the course of a current visit provided the material is stored out of sight from the waterway.

(3) Overland Trials

Back-packing is deemed a use compatible with the wilderness management of the BWCA which may alleviate crowding along the waterways and which will encourage enjoyment of inland wilderness and lakes. The Commissioner of Natural Resources may designate and improve a trails system. He shall solicit the United States Forest Service to enter into a joint management program for trails on state and federal lands as soon as practicable.

(c) Use of Waters of the State

(1) All limitations on use, transportation and storage of equipment on state lands in paragraph (b)(2) of this Rule also apply to waters of the state during all seasons of the year except that motors may be used on the following lakes which are only partially within the BWCA:

(aa) Those lakes listed in paragraph (b)(2)(aa), above, which are partially within the BWCA; and

(bb)

i. Fourtown Lake, T. 65 N., R. 11 W.

ii. Wood Lake, T. 64 N., R. 10 W.

iii. Southfarm Lake, T. 63 N., R. 11 W.

iv. Isabella Lake, T. 62 N., R. 8 W.

v. Moose Lake, T. 64 N., R. 9 W.

vi. Fall Lake, T. 63 N., R. 11 W.

vii. Homer Lake, T. 63 N., R. 3 W.

viii. East Pike Lake, T. 65 N., R. 3 E.

ix. Tin Can Mike Lake, T. 64 N., R. 11 W.

x. Ball Club Lake, T. 63 N., R. 1 W.

xi. Tucker Lake, T. 63 N., R. 3 W.

xii. Big Moose Lake, T. 64 N., R. 14 W.

(2) No watercraft may be staked, anchored or stored on or in waters of the state otherwise than as authorized by these rules.

(3) No amphibious craft of any type and no watercraft designed for, or used as floating living quarters shall be moored to, used on or transported over waters of the state governed by this rule.

(d) General: Joint Agreements, State Staffing

(1) The Commissioner shall enter into and execute joint agreements with the federal government for purposes of optimum management and enforcement in the BWCA. He shall designate a department employee who shall maintain a working liaison with the appropriate federal officials, particularly the Regional Forester, Duluth, and his office.

(2) In the event the Legislature authorizes the establishment of a special voyageur hunting program in the area, or parts thereof, this rule shall not be construed to bar it provided the program is consistent with the purposes of this rule and the authorities on which it is founded.

(e) Severability

The provisions of these rules shall be severable, and the invalidity of any paragraph, subparagraph or subdivision thereof shall not make void any other paragraph, subparagraph, subdivision on any other part.

(f) Effective Date

These rules shall be in full force and effect on February 1, 1971, except that those provisions relating to the storage of boats, motors and equipment shall not be in full force and effect until May 15, 1971, and except that those provisions relating to the possession, use and disposal of nonburnable food and beverage containers shall not be in full force and effect until May 1, 1971.

Petition

2

81-1198

No. _____

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

ELY-WINTON BOUNDARY WATERS CONSERVATION ALLIANCE; LOCAL 4757 UNITED STEELWORKERS OF AMERICA; GREATER VIRGINIA AREA CHAMBER OF COMMERCE; CRANE LAKE COMMERCIAL CLUB; MINNESOTA ARROWHEAD ASSOCIATION; ELY CHAMBER OF COMMERCE; CAROL M. FISHER; BORDER LAKES ASSOCIATION; CRANE LAKE SPORTSMEN'S CLUB; ASH RIVER NAMAKAN LAKE ASSOCIATION; CHARLOTTE EKROOT, d/b/a WINDIGO LODGE; RANGE ACTIONEERS, INC.; CITY OF WINTON; CARL BROWN, d/b/a WALLEYE BAIT AND TACKLE COMPANY; VIKING CRUISES, INC.; CONCERNED CITIZENS OF NORTHEASTERN MINNESOTA; BOUNDARY WATERS LANDOWNERS ASSOCIATION, a Minnesota Non-profit Corporation,

Petitioners,

vs.

JOHN R. BLOCK, Individually and as Secretary of Agriculture of the United States, et al.,

Respondents.

PETITION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Does the property clause of the United States Constitution authorize the federal government to regulate state and privately owned lands and waters to further the federal purposes for federal lands in the same vicinity?

PARTIES TO THE PROCEEDING

These parties are all set forth on petitioner, State of Minnesota's Petition, page ii.

TABLE OF AUTHORITIES

Cases:

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. ———

ELY-WINTON BOUNDARY WATERS CONSERVATION ALLIANCE; LOCAL 4757 UNITED STEELWORKERS OF AMERICA; GREATER VIRGINIA AREA CHAMBER OF COMMERCE; CRANE LAKE COMMERCIAL CLUB; MINNESOTA ARROWHEAD ASSOCIATION; ELY CHAMBER OF COMMERCE; CAROL M. FISHER; BORDER LAKES ASSOCIATION; CRANE LAKE SPORTSMEN'S CLUB; ASH RIVER NAMAKAN LAKE ASSOCIATION; CHARLOTTE EKROOT, d/b/a WINDIGO LODGE; RANGE ACTIONEERS, INC.; CITY OF WINTON; CARL BROWN, d/b/a WALLEYE BAIT AND TACKLE COMPANY; VIKING CRUISES, INC.; CONCERNED CITIZENS OF NORTHEASTERN MINNESOTA; BOUNDARY WATERS LANDOWNERS ASSOCIATION, a Minnesota Non-profit Corporation,

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JOHN R. BLOCK, Individually and as Secretary of Agriculture of the United States, et al.,

Respondents.

PETITION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

STATEMENT OF THE CASE

There were five separate cases initiated in the District Court and filed for appeal in the Eighth Circuit Court of Appeals, numbers 80-1769; 80-1784; 80-1815; 80-1860; and 80-1872. All these cases were, for purposes of simplifying the matter, consolidated for trial on the District Court level and also the Court of Appeals. These petitioners were the original plaintiffs in three of them and raised the issue raised by the State of Minnesota's petition.

For purposes of brevity, the petitioners as heretofore identified, accept the Statement of the Case as prepared by the petitioner, the State of Minnesota.

REASONS FOR GRANTING THE WRIT

The Eighth Circuit Court of Appeals has plowed new ground in interpreting the property clause of the Federal Constitution. They have in one fell swoop incorporated interstate commerce law into interpretations of the property clause. The implications are difficult, if not impossible. to determine, for the property clause has never previously been interpreted this way. Article IV, Subsection 3 gives Congress power under non-federal land only to combat an imminent, grave and direct threat to the use of nearby federal land.

1. MISAPPLICATION OF KLEPPE V. NEW MEXICO

Kleppe v. New Mexico, 426 U.S. 529 (1976), holds only that the United States Government has as much right to use its land as it desires as any other person,

corporation, municipality or state. It does not hold that the use of federal land may be imposed on adjoining state or private land. It *does* hold that a state may not impose its rules and regulations on federal land.

2. IMPROPER CONCLUSION FROM CAMFIELD AND ALFORD

Camfield v. United States, 167 U.S. 518 (1897), and *United States v. Alford,* 274 U.S. 264 (1927), are two cases the Court of Appeals used for extending property clause power beyond the boundaries of federal land. Yet, a cursory reading of those two cases shows the following:

(a) Where the facts showed an adjacent landowner started a forest fire on his property in a fit of peak against the United States and was hoping to burn federal land thereby, he was estopped.

(b) Where private landowners by the erection of fences precluded free and unfettered use of federal land they were held to violate the property clause.

Camfield holds, as it would for any landowner, that because you're mad at your neighbor you cannot burn down your house, thus hoping to set fire to your neighbor's. Plain nuisance would preclude this. The federal government has as much right to this protection as any other landowner.

Alford merely holds that you cannot, by the use of your property, deprive others of the use of theirs.

3. In *McKelvey v. United States,* 260 U.S. 353 (1927), defendant threatened and shot a herdsman attempting to lawfully cross public range land and was con-

victed under a federal statute prohibiting the use of force and threats to obstruct passage over public land. The court held that, although the offense took place on private land, the threat to users of public land was sufficiently real, imminent and grave to justify the regulation under the property clause.

CONCLUSION

These petitioners initiated the first case that was filed in the United States District Court in Minnesota contesting this particular legislation. They alleged the purpose of this appeal, among others, in their complaint.

The United States Court of Appeals, Eighth Circuit, has by its decision, in effect, stated that the property clause, by creeping interpretation, can use the same type of thinking as presently used in interpreting the commerce clause of the U.S. Constitution. The evidence as adduced at trial reveals that both plaintiffs and defendants in the original lawsuits agreed with the purposes of PL No. 95-495, 92 Stat. 1649-59 (BWCAW Act). as set forth in the Purpose Clause of said Act, Section 2(1)(2)(3)(4)(5). They really only disagreed as to (6), which reads as follows:

> "Provide for the orderly and equitable transition from motorized recreational uses to non-motorized recreational uses on those lakes, streams and portages in the wilderness where such mechanized uses are to be phased out under provisions of this Act."

Thus, we see the property clause is being used to enforce one set of "recreationalists" against another set of "recreationalists". For this purpose, they are demanding

private and state lands to comply with this Congress' view of what should be the proper use on lands "outside" of the boundaries of said BWCAW.

This law is plain unadulterated zoning—not for stopping someone from burning your land, or shooting someone—but solely because this Congress, at this point in time, feels canoeists have more rights than motor traffic. Fine, they can do it on their land, but not ours or the state's.

If the United States ever owned all of the sites of its post offices spread through the width and breadth of this land, the Congress through the property clause, could effectively zone any and all adjacent land thereto to parking lots or whatever the Congress seemed to feel would be of use. They could do this without purchase and without condemnation. Assume that all post offices presently have parking lots. By the Eighth Circuit Court's interpretation, the Congress could permit only bicycle parking. as contra to the use of automobiles through this zoning effort. This violates due process.

Ely-Winton Boundary Waters Conservation Alliance; Local 4757 United Steelworkers of America; Greater Virginia Area Chamber of Commerce; Crane Lake Commercial Club; Minnesota Arrowhead Association; Ely Chamber of Commerce; Carol M. Fisher, Border Lakes Association; Crane Lake Sportsmen's Club; Ash River Namakan Lake Association; Charlotte Ekroot, d/b/a Windigo Lodge; Range Actioneers, Inc.; City of Winton; Carl Brown, d/b/a Walleye Bait and Tackle Company; Viking Cruises, Inc.; Concerned Citizens of Northeastern Minnesota; and Boundary Waters Landowners Association, a

Minnesota Non-profit Corporation, respectfully request that the Petition for Writ of Certiorari be granted to settle the Eighth Circuit Court of Appeals' most far reaching decision.

Respectfully submitted,

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Appendix

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No. 81-1198

IN THE

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OCTOBER TERM, 1981

STATE OF MINNESOTA,

Petitioner,

vs.

JOHN R. BLOCK, Individually and as Secretary of Agriculture of the United States, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

APPENDIX

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[499 F. Supp. 1223 (D. Minn. 1980)]

Order on Motion to Alter Judgment B-148

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 80-1769
No. 80-1784
No. 80-1815
No. 80-1860
No. 80-1872

State of Minnesota by Joseph N. Alexander, its Commissioner of Natural Resources,

Appellant,

and

Minnesota United Snowmobilers Association, Inc.; Ely-Winton Boundary Waters Conservation Alliance; Local 4757, United Steelworkers of America; Greater Virginia Area Chamber of Commerce; Crane Lake Commercial Club; Minnesota Arrowhead Association; Ely Chamber of Commerce; Carol M. Fisher; Border Lakes Association; Crane Lake Sportsmen's Club; Ash River Namakan Lake Association; Charlotte Ekroot, d/b/a Windigo Lodge; Range Actioneers, Inc.; City of Winton; National Association of Property Owners; Carl Brown, d/b/a Walleye Bait and Tackle Co.; Viking Cruises, Inc.; Concerned Citizens of Northeastern Minnesota; Boundary Waters Landowners Association, a Minnesota non-profit corporation; Koochiching County; City of South International Falls; Village of Ranier; International Falls Chamber of Commerce; and City of International Falls,

Intervenor-Appellants,

v.

John R. Block,* individually and as Secretary of Agriculture of the United States,

Appellee,

and

Sierra Club; Friends of the Boundary Waters Wilderness; Izaak Walton League of America, Inc.; League of Women Voters of Minnesota, Inc.; Minnesota Rovers; Wilderness Inquiry II; Minnesota Environmental Control Citizens' Association; Minneapolis Chapter of the National Audubon Society; St. Paul Chapter of the National Audubon Society; Duluth Chapter of the National Audubon Society; Minnesota Ornithologists' Union; and the Wilderness Society,

Intervenor-Appellees.

No. 81-1166
No. 81-1167
No. 81-1169
No. 81-1175

National Association of Property Owners; National Park Inholders Association; Ely-Winton Boundary Waters Conservation Alliance; Local 4757, United Steelworkers of America; Lac La Croix Indian Band; Greater Virginia Area Chamber of Commerce; Crane Lake Commercial Club; Minnesota Arrowhead Association; Ely Chamber of Commerce; Carol M. Fisher; Border Lakes Association; Crane Lake Voyageur Snowmobile Club, Inc.; Crane Lake Sportsmen's Club; Ash River Namakan

*Secretary of Agriculture Bob Bergland, originally named as a party, has been replaced by John R. Block, his successor in office. *See* Fed. R. App. P. 43(c) (1).

Lake Association; Charlotte Ekroot, d/b/a Windigo Lodge; and Robert J. Handberg, d/b/a Campbells Cabins and Trading Post,

Appellants,

and

State of Minnesota, by Joseph N. Alexander, its Commissioner of Natural Resources,

Intervenor-Appellant,

v.

United States of America; and John R. Block,* Secretary of Agriculture, individually and in his official capacity,

Appellees,

and

Sierra Club; Friends of the Boundary Waters Wilderness; Izaak Walton League of America, Inc.; League of Women Voters of Minnesota, Inc.; Minnesota Rovers; Wilderness Inquiry II; Minnesota Environmental Control Citizens' Association; Minneapolis Chapter of the National Audubon Society; St. Paul Chapter of the National Audubon Society; Duluth Chapter of the National Audubon Society; Minnesota Ornithologists' Union; and the Wilderness Society,

Intervenor-Appellees.

No. 81-1168

National Association of Property Owners; Ely-Winton Boundary Waters Conservation Alliance; Range Ac-

tioneers, Inc.; Crane Lake Sportsmen's Club; and City of Winton,

Appellants,

v.

John R. Block,* individually and in his official capacity as Secretary of Agriculture; and R. Max Peterson, individually and in his official capacity as Chief of the United States Forest Service,

Appellees,

and

Sierra Club; Friends of the Boundary Waters Wilderness; Izaak Walton League of America, Inc.; League of Women Voters of Minnesota, Inc.; Minnesota Rovers; Wilderness Inquiry II; Minnesota Environmental Control Citizens' Association; Minneapolis Chapter of the National Audubon Society; St. Paul Chapter of the National Audubon Society; Duluth Chapter of the National Audubon Society; Minnesota Ornithologists' Union; and the Wilderness Society,

Intervenor-Appellees.

Appeals from the United States District Court for the District of Minnesota.

Submitted: June 18, 1981

Filed: September 30, 1981

[660 F.2d 1244]

Before Lay, Chief Judge; BRIGHT and STEPHENSON, Circuit Judges.

BRIGHT, Circuit Judge.

These appeals arise from three consolidated cases involving multiple challenges to provisions of the Boundary

Waters Canoe Area Wilderness Act of 1978, Pub. L. No. 95-495, 92 Stat. 1649 (BWCAW Act or the Act). On cross motions for summary judgment, the United States District Court for the District of Minnesota upheld all portions of the Act.[1] *National Association of Property Owners v. United States,* 499 F. Supp. 1223 (D. Minn. 1980). In this opinion, we will consider separately two groups of appeals. In Case No. 1, appellants allege that Congress unconstitutionally applied federal controls on the use of motorboats and snowmobiles to land and waters not owned by the United States. In Case No. 2, appellants assert that certain provisions of the legislation violate the Constitution and conflict with preexisting treaties and statutes.

Case No. 1

The State of Minnesota, joined by the National Association of Property Owners (NAPO) and numerous individuals, businesses, and organizations,[2] brought suit against the United States, challenging tthe constitutionality of the BWCAW Act as applied to lands and waters that the federal government does not own. A group of organizations concerned with the environmental and wilderness aspects of the boundary waters intervened in support of the United States.[3]

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[1]Before the Honorable Miles W. Lord, now Chief Judge.

[2]Most of these intervenors also participated in the separate actions considered in this opinion as Case No. 2. *See* n. 32 *infra.*

[3]These groups include the Sierra Club; Friends of the Boundary Waters Wilderness; League of Women Voters of Minnesota; Izaak Walton League of America, Inc.; Minnesota Rovers; Wilderness Inquiry II; Minnesota Environmental Control Citizens' Association; Minneapolis, St. Paul, and Duluth Chapters of the National Audubon Society; Minnesota Ornithologists' Union; and the Wilderness Society (referred to collectively as Sierra Club).

The challenged portion of the statute,[4] section 4, prohibits the use of motorboats in the BWCAW in all but a small number of lakes. The Act also limits snowmobiles to two routes. The United States owns ninety percent of the land within the borders of the BWCAW area. The State of Minnesota, in addition to owning most of the remaining ten percent of the land, owns the beds of all the lakes and rivers within the BWCAW.

Appellants assert that Congress had no power to enact the motor vehicle restriction as applied to nonfederal lands and waters. We reject this contention and conclude that Congress, in passing this legislation, acted within its authority under the property clause of the United States Constitution and that such action did not contravene the tenth amendment of the Constitution. Accordingly, we affirm.

[660 F.2d 1245]

I. *Background.*

The Boundary Waters Canoe Area Wilderness (BWCAW), a part of the Superior National Forest, consists of approximately 1,075,000 acres of land and waterways along the Minnesota-Canadian border. A sponsor of this legislation described the area in introducing the BWCAW Act on the House floor:

> The Boundary Waters Canoe Area is the largest wilderness area east of the Rocky Mountains and

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[4]In addition to the provisions challenged here, the Act, *inter alia*, prohibits mining, phases out timber harvesting, and expands the area an additional 45,000 acres. The Act also officially designates the area as the "Boundary Waters Canoe Area Wilderness (BWCAW)."

Section 5 of the Act provides that qualifying resort owners may force the federal government to buy their property and that the federal government then acquires the right of first refusal in certain designated property. These provisions will be considered in Case No. 2 *infra*.

the second largest in our wilderness system. It is our Nation's only lakeland canoe wilderness—a network of more than 1,000 lakes linked by hundreds of miles of streams and short portages which served as the highway of fur traders who followed water routes pioneered by Sioux and Chippewa Indians. Despite extensive logging, the BWCA still contains 540,000 acres of virgin forests, by far the largest such area in the eastern United States.

This last remnant of the old "north-woods" is remarkable not only for its lakes and virgin forests, but also for its wildlife. * * * [M]any western wilderness areas lack such complete food chains. This natural ecosystem is a valuable educational and scientific resource; it has been the focal point of important research in wildlife behavior, forest ecology, nutrient cycles, lake systems, and vegetation history.

The BWCA is complemented on the Canadian side of our border by the Quetico Provincial Park of Ontario where commercial logging and nearly all motorized recreational activity are prohibited. Together, these areas encompass an area the size of Yellowstone National Park and constitute one of the finest wilderness areas on our continent. Not surprisingly, the BWCA is the most heavily used unit in the national wilderness system, drawing people from throughout the country who seek the solitude of a wilderness experience. [123 Cong. Rec. H621-22 (daily ed. Jan. 31, 1977), *reprinted in* LEGISLATIVE HISTORY OF THE BOUNDARY WATERS ACT of 1978, at 1-2.]

Beginning with the federal government's first reservation of forest land in 1902,[5] up to the present, both the United States and the State of Minnesota have sought to protect the boundary waters area.[6] Increasingly through the century, the governments have sought to preserve the primitive character of the area.[7] These efforts resulted in the designation of the boundary waters as part of the national wilderness system established under the Wilderness Act of 1964, *as amended*, 16 U.S.C. §§ 1131-36 (1976).

The Wilderness Act of 1964 prohibited use of motorized vehicles in any national wilderness area. That Act, however, provided a specific exception for the Boundary Waters Canoe Area:

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[5]In 1909, President Theodore Roosevelt culminated seven years of federal reservation by proclaiming the one million-acre area as the Superior National Forest. Reservation and acquisition of additional lands continued through the century.

[6]The boundary waters area has also been under international protection since early in the century. Canada and the United States negotiated the Root-Bryce Treaty of 1909, establishing joint regulation and limiting use of the waters along the international boundary. Also in 1909, the Province of Ontario set aside the Quetico Forest Reserve on the Canadian side of the border.

[7]In 1926, the Secretary of Agriculture created the "Superior Wilderness Area" establishing a roadless area in one thousand square miles of the best canoe country. In 1930, Congress enacted the Shipstad-Nolan Act, 16 U.S.C. §577 *et seq.* (1976), to protect the natural features and forests of the area by prohibiting logging within 400 feet of any lake shore and restricting alteration of water or water levels. In 1933, Minnesota enacted similar legislation. In 1948, Congress passed the Thye-Blatnik Act, 16 U.S.C. §577c (1976), authorizing the Secretary of Agriculture to acquire land to protect and enhance the wilderness canoe area. Minnesota consented to the federal acquisition of any land within the National Forest, subject to concurrent federal and state jurisdiction. *See* Minn. Stat. §1.045 (West 1977). Also in 1948, the Forest Service designated the Superior, Little Indian Sioux, and Caribou Roadless Areas as needing special protection to preserve the recreational values afforded by the primitive character of the wilderness. In 1949, President Truman banned aircraft from the air space over the region.

> Other provisions of this chapter to the contrary notwithstanding, the management of the Boundary Waters Canoe Area * * * shall be in accordance with regulations established by the Secretary of Agriculture in accordance with the general purpose of maintaining, without unnecessary restrictions on other uses, including that of timber, the primitive character of the area, particularly in the vicinity of lakes, streams, and portages: *Provided*, That nothing in this chapter shall preclude the continuance within the area of any already established use of motorboats. [16 U.S.C. § 1133(d)(5) (1976).][8]

In response to the confusion and litigation generated by the proviso, as well as in reaction to threatened deterioration of the wilderness from excessive use, Congress enacted the Boundary Waters Canoe Area Wilderness Act of 1978. At issue here are portions of section 4 of the Act, the provision barring the use of motorized craft in all but designated portions of the wilderness.[9] Section 4

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[8]Pursuant to this mandate, the Secretary of Agriculture issued a management plan for the area, establishing an Interior Zone free from logging activity and designating 19 motorized routes, covering 60 percent of the surface water. Minnesota likewise banned motor use except in those areas designated by the United States Secretary of Agriculture. In 1976, the United States Secretary of Agriculture banned all snowmobiling within the wilderness area.

[9]Section 4 of the Act provides:

> Sec. 4. (a) The Secretary shall administer the wilderness under the provisions of this Act, the Act of January 3, 1975 (88 Stat. 2096; 16 U.S.C. 1132 note), the Wilderness Act of 1964 (78 Stat. 890, 16 U.S.C. 1131-1136), and in accordance with other laws, rules and regulations generally applicable to areas designated as wilderness.
>
> (b) Paragraph (5) of section 4(d) of the Wilderness Act of 1964 is hereby repealed and paragraphs (6), (7), and (8) of such section 4(d) are hereby redesignated as paragraphs (5), (6), and (7).

(c) limits motorboat use to

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designated lakes and rivers, allowing a maximum of either

(c) Effective on January 1, 1979, the use of motorboats is prohibited within the wilderness designated by this Act, and that portion within the wilderness of all lakes which are partly within the wilderness, except for the following:

(1) On the following lakes, motorboats with motors of no greater than twenty-five horsepower shall be permitted: Fall, Lake County; Newton, Lake County; Moose, Lake County; Newfound, Lake County; Sucker, Lake County; Snowbank, Lake County; East Bearskin, Cook County; South Farm, Lake County; Trout, Saint Louis County; Basswood, except that portion generally north of the narrows at the north end of Jackfish Bay and north of a point on the international boundary between Ottawa Island and Washington Island; Saganaga, Cook County, except for that portion west of American Point; *Provided:* That, on the following lakes, until January 1, 1984, the horsepower limitations described in this paragraph shall not apply to towboats registered with the Secretary: Moose, Lake County; Newfound, Lake County; Sucker. Lake County; Saganaga, Cook County, as limited in this paragraph.

(2) On the following lakes and river, motorboats with motors no greater than ten horsepower shall be permitted: Clearwater, Cook County; North Fowl, Cook County; South Fowl, Cook County; Island River east of Lake Isabella, Lake County; Sea Gull, that portion generally east of Threemile Island, Cook County; Alder, Cook County; Canoe, Cook County.

(3) On the following lakes, or specified portions of lakes, motorboats with motors of no greater than ten horsepower shall be permitted until the dates specified: Basswood River to and including Crooked Lake. Saint Louis and Lake Counties, until January 1, 1984; Carp Lake, the Knife River, and Knife Lake, Lake County, until January 1, 1984; Sea Gull, Cook County, that portion generally west of Threemile Island, until January 1, 1999; Brule, Cook County, until January 1, 1994, or until the termination of operation of any resort adjacent to Brule Lake in operation as of 1977, whichever occurs first.

(4) On the following lakes, or specified portions of lakes, motorboats with motors of no greater than twenty-five horsepower shall be permitted until January 1, 1984: Birch, Lake County; Basswood, Lake County, that portion generally north of the narrows at the north end of Jackfish Bay and north of a point on the international boundary between Ottawa Island and Washington Island.

(d) The detailed legal description and map to be published pursuant to section 3 of this Act shall contain a description of the various areas where the motorized uses permitted by this section are located. No provision of this section shall be construed to limit mechanical portages or the horsepower of motors used on motorboats in the following areas within the wilderness.

ten or twenty-five horsepower motors on these waters. Section 4(e) permits certain limited mechanized portages. Sec-

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Little Vermilion Lake, Saint Louis County; Loon River, Saint Louis County; Loon Lake, Saint Louis County; that portion of the Lac La Croix, Saint Louis County, south of Snow Bay and east of Wilkins Bay.

(e) For the purposes of this Act, a snowmobile is defined as any motorized vehicle which is designed to operate on snow or ice. The use of snowmobiles in the wilderness designated by this Act is not permitted except that the Secretary may permit snowmobiles, not exceeding forty inches in width, on (1) the overland portages from Crane Lake to Little Vermilion Lake in Canada, and from Sea Gull River along the eastern portion of Saganaga Lake to Canada, and (2) on the following routes until January 1, 1984:

Vermilion Lake portage to and including Trout Lake; Moose Lake to and including Saganaga Lake via Ensign, Vera and Knife Lakes, East Bearskin Lake to and including Pine Lake via Alder Lake and Canoe Lake.

In addition to the routes listed above, the Secretary may issue special use permits for the grooming by snowmobiles of specified cross-country ski trails for day use near existing resorts.

(f) The Secretary is directed to develop and implement, as soon as practical, entry point quotas for use of motorboats within the wilderness portions of the lakes listed in subsection c, the quota levels to be based on such criteria as the size and configuration of each lake, and the amount of use on that lake: *Provided*, That the quota established for any one year shall not exceed the average actual annual motorboat use of the calendar years 1976, 1977, and 1978 for each lake, and shall take into account the fluctuation in use during different times of the year: *Provided further*, That on each lake homeowners and their guests and resort owners and their guests on that particular lake shall have access to that particular lake and their entry shall not be counted in determining such use.
supra, 426 U.S. at 537-38.

(g) Nothing in this Act shall be deemed to require the termination of the existing operation of motor vehicles to assist in the transport of boats across the portages from Sucker Lake to Basswood Lake, from Fall Lake to Basswood Lake, and from Lake Vermilion to Trout Lake, during the period ending January 1, 1984. Following said date, unless the Secretary determines that there is no feasible non-motorized means of transporting boats across the portages to reach the lakes previously served by the portages listed above, he shall terminate all such motorized use of each portage listed above.

(h) The motorized uses authorized by this section shall be confined to those types of snowmobiles, motorboats and vehicles which have been in regular use in the Boundary Waters Canoe

tion 4(e) restricts the use of snowmobiles to two designated trails.[10] With these exceptions, the Act as construed by the federal government and by the district court, prohibits all other motorized transportation on land and water falling within the external boundaries of the wilderness area.[11]

The boundaries of the BWCAW circumscribe a total surface area of approximately 1,080,300 acres—920,000 acres of land and 160,000 of water. The United States owns approximately 792,000 acres of land surface, while the State of Minnesota owns approximately 121,000 acres of land,[12] in addition to the beds under the 160,000 acres of navigable water. *See National Association of Property Owners v. United States, supra,* 499 F. Supp. at 1253. Congress recognized that Minnesota would retain jurisdiction over the waters, but provided that the State could not regulate in a manner less stringent than that mandated by the Act.[13]

Area prior to the date of enactment of this Act. The Secretary may set forth additional standards and criteria to further define the type of motorized craft which may be permitted.

(i) *Except for motorboats, snowmobiles, and mechanized portaging, as authorized and defined herein, no other motorized use of the wilderness shall be permitted.* Nothing in this Act shall prohibit the use of aircraft, motorboats, snowmobiles, or other mechanized uses in emergencies, or for the administration of the wilderness area by Federal, State, and local governmental officials or their deputies, only where the Secretary finds that such use is essential. [92 Stat. 1650-52 (emphasis added).]

[10]The Act also permits snowmobiling on three other trails for up to five years.

[11]In 1979, Ontario banned virtually all motor vehicles in Quetico Provincial Park.

[12]Private parties own approximately 7,300 acres of land.

[13]Specifically, §15 provides:

The Secretary is authorized to promulgate and enforce regulations that limit or prohibit the use of motorized equipment on or relating to waters located within the wilderness in accordance with the provisions of this Act: *Provided,* That nothing in this Act shall be construed as affecting the jurisdiction or responsibilities of the State with respect to such waters except to the extent that the exercise of such jurisdiction is less stringent than the Secretary's regulations promulgated pursuant to this section * * *. [92 Stat. 1657.]

Minnesota brought this action[14] against the United States on December 27, 1979, challenging the application of section 4 to land and waterways under state jurisdiction that fall within the boundaries of the BWCAW. The district court rejected the State's claim, holding that section 4, as applied to nonfederal property, constituted a valid exercise of Congress' legislative power under the property clause of the United States Constitution. *National Association of Property Owners v. United States, supra.* 499 F. Supp. at 1261.

On appeal, Minnesota and the intervening plaintiffs renew their assertions (1) that Congress acted in excess of its authority under the property clause by curtailing the use of motor-powered boats and other motorized vehicles on lands and waters not owned by the United States; and (2) that the tenth amendment of the United States Constitution bars the application of section 4 to "state-owned" lands and waters.[15]

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[14]The district court consolidated this case with the two cases to be discussed in Case No. 2 of this opinion. *See infra.*

[15]Minnesota also asserts that §4 of the Act, when properly construed, does not apply to lands and waters under state jurisdiction within the boundaries of the BWCAW. Appellants' argument contradicts the plain language as well as the purpose and legislative history of the Act. Inasmuch as all navigable waters within the area fall under state jurisdiction, Congress' clear intent to ban motorboats from waters necessarily demonstrates an intent to ban them from state waters. The entire focus of the debate before Congress concerned which lakes would be designated motor-free. Section 2 specifically provides:

> It is the purpose of this Act to
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> * * * *
>
> (6) provide for the orderly and equitable transition from motorized recreational uses to nonmotorized recreational uses *on those lakes, streams, and portages in the wilderness where such mechanized uses are to be phased out under the provisions of this Act.* [92 Stat. 1649 (emphasis added).]

II. *Property Clause*

The property clause provides: "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States * * *." U.S. Const. art. IV, § 3, cl. 2. In a recent unanimous decision, the Supreme Court upheld an expansive reading of Congress' power under the property clause. *See Kleppe v. New Mexico*, 426 U.S. 529 (1976).[16] The Court concluded that

> the Clause, in broad terms, gives Congress the power to determine what are "needful" rules "respecting" the public lands. * * * And while the furthest reaches of the power granted by the Property Clause have not yet been definitively resolved, we have repeatedly observed that "[t]he power over the public lands thus entrusted to Congress is without limitations." [*Id.* at 539.]

With this guidance, we must decide the question left open in *Kleppe*—the scope of Congress' property clause power as applied to activity occurring off federal land.

In addition, the exemptions provided by §4 of the Act make no sense unless Congress intended to ban motorized use on all nonexempt lakes. Finally, §15 authorizes the Secretary to issue regulations "that limit or prohibit the use of motorized equipment on or relating to waters located within the wilderness * * *." Thus, we find this argument without merit.

[16]Prior to *Kleppe*, language in Supreme Court opinions supported the argument that Congress' power over federally owned property did not exceed "the rights of an ordinary proprietor * * *." *Ft. Leavenworth R.R. Co. v. Lowe*, 114 U.S. 525, 527 (1885) (dicta). *Accord, Paul v. United States*, 371 U.S. 245, 264 (1963) (dicta). The Court in *Kleppe*, however, rejected any narrow construction of the property clause, holding that Congress possessed full legislative/police power over activity occurring *on federal property*. In other words, any conduct taking place on United States land may be subject to congressional authority, regardless of its relationship to that land. *Kleppe v. New Mexico, supra*, 426 U.S. at 540.

Without defining the limits of the power, the Court in *Kleppe*, relying on its decision in *Camfield v. United States*, 167 U.S. 518 (1897), acknowl-

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edged that "it is clear the regulations under the Property Clause may have some effect on private lands not otherwise under federal control." 426 U.S. at 546. In *Camfield*, the Court concluded that Congress possessed the power to control conduct occurring off federal property through its "power of legislating for the protection of the public lands, though it may thereby involve the exercise of what is ordinarily known as the police power, so long as such power is directed solely to [the public lands'] own protection." *Camfield v. United States, supra*, 167 U.S. at 526.[17]

Under this authority to protect public land, Congress' power must extend to regulation of conduct on or off the public land that would threaten the designated purpose of federal lands.[18] Congress clearly has the power to dedi-

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[17]In *Camfield*, the Supreme Court upheld federal regulation of fences built on private land adjoining United States property. These fences had the effect of enclosing the federal land and giving the private landowner sole use of public land.

[18]Appellants' narrow and improper construction of the property clause would limit the reach of Congress' power to the particular factual situations approved in *Camfield* and *United States v. Alford*, 274 U.S. 264 (1927) (protecting forests against dangers of fire occurring on federal land). *See also United States v. Lindsey*, 595 F.2d 5, 6 (9th Cir. 1979).

The case relied on by appellants, *Kansas v. Colorado*, 206 U.S. 46 (1906), has been greatly limited by the Supreme Court. In *Kleppe*, the Court wrote that *Kansas v. Colorado* "does no more than articulate the obvious: The Property Clause is a grant of power only over federal property. It gives no indication of the kind of 'authority' the Clause gives Congress over its property." *Kleppe v. New Mexico, supra*, 426 U.S. at 537-38.

cate federal land for particular purposes. As a necessary incident of that power, Congress must have the ability to insure that these lands be protected against interference with their intended purposes. As the Supreme Court has stated, under the property clause "[Congress] may sanction some uses and prohibit others, and *may forbid interference with such as are sanctioned.*" *McKelvey v. United States*, 260 U.S. 353, 359 (1922) (emphasis added).

This court has previously held that Congress, under the property clause, could prohibit hunting on waters within the boundaries of the Voyagers National Park in Minnesota, even though the waters were subject to state jurisdiction. *United States v. Brown*, 552 F.2d 817, 821 (8th Cir.), *cert. denied*, 431 U.S. 949 (1977). In *Brown*, the purpose of the challenged regulations extended beyond the mere protection of the federal land from physical harm. This court, in effect, affirmed the district court's approval of the regulations as necessary because "hunting on the waters in the park could 'significantly interfere with the *use of the park and the purposes for which it was established.*' " *Id.* at 822 (emphasis added).[19]

The Court then cited *Camfield* with approval as establishing Congress' police power over nuisances occurring off federal land as long as it is directed to protecting the federal land. *Id.* at 538. These cases, read together, establish that Congress has no plenary authority over conduct on nonfederal land, *Kansas v. Colorado, supra;* rather, Congress must demonstrate a nexus between the regulated conduct and the federal land, establishing that the regulations are necessary to protect federal property. *Camfield v. United States, supra.*

[19]Two other district courts have affirmed Congress' power to regulate conduct on nonfederal land to further the purpose of federal lands. *United States v. Maki*, 5-78-2M (D. Minn. 1978) (McNulty, Magis.) (approving Secretary of Agriculture's action banning snowmobiles in BWCA to promote wilderness purpose). *United States v. Hells Canyon Guide Service* No. 79-743 (D. Ore. Nov. 14, 1979)

Having established that Congress may regulate conduct off federal land that interferes with the designated purpose of that

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land, we must determine whether Congress acted within this power in restricting the use of motorboats and other motor vehicles in the BWCAW. In reviewing the appropriateness of particular regulations, "we must remain mindful that, while courts must eventually pass upon them, determinations under the Property Clause are entrusted primarily to the judgment of Congress." *Kleppe v. New Mexico, supra,* 426 U.S. at 536. *Accord, United States v. San Francisco,* 310 U.S. 16, 29-30 (1940); *United States v. Brown, supra,* 552 F.2d at 822. Thus, if Congress enacted the motorized use restrictions to protect the fundamental purpose for which the BWCAW had been reserved, and if the restrictions in section 4 reasonably relate to that end, we must conclude that Congress acted within its constitutional prerogative.

Congress passed the BWCAW Act with the clear intent of insuring that the area would remain as wilderness and could be enjoyed as such.[20] Specifically concerning the

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(Juba, Magis.) (Secretary of Agriculture has power to regulate motorized use of Snake River, although water subject to state jurisdiction), *appeal docketed,* No. 80-3095 (9th Cir. Mar. 6, 1980). Relying on *United States v. Brown, supra,* the court in *Hells Canyon* concluded that "Congress' power over federal lands includes the authority to regulate activities on non-federal waters in order to protect the archaeological, ecological, historical and recreational values on the lands." Slip op. at 5.

[20]Section 2 of the Act sets out congressional purposes:

Sec. 2. It is the purpose of this Act to provide for such measures respecting the areas designated by this Act as the Boundary Waters Canoe Area Wilderness and Boundary Waters Canoe Area Mining Protection Area as will—

motor use regulations, Congressman Fraser, in introducing the 1978 Act, stated:

> The bill has four major thrusts. First, and most important, it seeks to end those activities that threaten the integrity of the BWCA's wilderness character by expressly prohibiting the following uses:
> * * * *

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(1) provide for the protection and management of the fish and wildlife of the wilderness so as to enhance public enjoyment and appreciation of the unique biotic resources of the region,

(2) protect and enhance the natural values and environmental quality of the lakes, streams, shorelines and associated forest areas of the wilderness,

(3) maintain high water quality in such areas,

(4) minimize to the maximum extent possible, the environmental impacts associated with mineral development affecting such areas,

(5) prevent further road and commercial development and restore natural conditions to existing temporary roads in the wilderness, and

(6) provide for the orderly and equitable transition from motorized recreational uses to nonmotorized recreational uses on those lakes, streams, and portages in the wilderness where such mechanized uses are to be phased out under the provisions of this Act. [92 Stat. 1649.]

In addition, the BWCAW remains part of the National Wilderness Preservation System, and thus regulations affecting the BWCAW may also be said to advance the purposes of the Wilderness Act. 16 U.S.C. §1131(a) states:

(a) In order to assure that an increasing population, accompanied by expanding settlement and growing mechanization, does not occupy and modify all areas within the United States and its possessions, leaving no lands designated for preservation and protection in their natural condition, it is hereby declared to be the policy of the Congress to secure for the American people of present and future generations the benefits of an enduring resource of wilderness. For this purpose there is hereby established a National Wilderness Preservation System to be composed of federally owned areas designated by Congress as "wilderness areas", and these shall be administered for the use and enjoyment of the American people in such manner as will leave them unimpaired for future use and enjoyment as wilderness, and so as to provide for the protection of these areas, the preservation of their wilderness character, and for the gathering and dissemination of information regarding their use and enjoyment as wilderness; and no Federal lands shall be designated as "wilderness areas" except as provided for in this chapter or by a subsequent Act.

> Recreational uses of motorized watercraft and snowmobiles * * *. [123 Cong. Rec. H621 (daily ed. Jan. 31, 1977), *reprinted in* LEGISLATIVE HISTORY OF THE BOUNDARY WATERS ACT of 1978, at 1.]

Congress based its conclusions on certain statutory findings:

> SECTION 1. The Congress finds that it is necessary and desirable to provide for the protection, enhancement, and preservation of the natural values of the lakes, waterways, and associated forested areas known (before the date of enactment of this Act) as the Boundary Waters Canoe Area, and for the orderly
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> [660 F.2d 1251]
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> management of public use and enjoyment of that area as wilderness, and of certain contiguous lands and waters, while at the same time protecting the special qualities of the area as a natural forest-lake-land wilderness ecosystem of major esthetic, cultural, scientific, recreational and educational value to the Nation. [92 Stat. 1649.]

Hearings and other evidence provided ample support for Congress' finding that use of motorboats and snowmobiles must be limited in order to preserve the area as a wilderness. Testimony established that the sight, smell, and sound of motorized vehicles seriously marred the wilderness

experience of canoeists, hikers, and skiers and threatened to destroy the integrity of the wilderness.[21]

As a result of considerable testimony and debate and a series of compromises, Congress enacted section 4 in an attempt to accommodate all interests, determining the extent of motorized use the area might tolerate without serious threat to its wilderness values.[22]

The motor use restrictions form only a small part of an elaborate system of regulation considered necessary to preserve the BWCAW as a wilderness.[23] The United States owns close to ninety percent of the land surrounding the waters at issue. Congress concluded that motorized vehicles significantly interfere with the use of the wilderness by canoeists, hikers, and skiers and that restricted motorized use would enhance and preserve the wilderness values of the area. From the evidence presented, Congress could rationally reach these conclusions. We hold, therefore, that Congress acted within its power under the Con-

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[21]Among other goals, Congress sought to control use to avoid threatened destruction caused by over-popularity of the wilderness area. As stated by Congressman Vento of Minnesota:

> It is amazing that this wilderness should be threatened by our enthusiasm to rush forward and to use it. * * * [T]o be threatened by the fact of overuse of recreation is indeed a sad irony. That overuse relates to canoeists and motorboat users. It relates to a variety of use. [124 Cong. Rec. H4944 (daily ed. June 5, 1978), *reprinted in* LEGISLATIVE HISTORY OF THE BOUNDARY WATERS ACT of 1978, at 119.]

Congress, through the Act, has brought the regulation of the BWCAW in line with that of other wilderness areas, thus recognizing that historically the use of motor vehicles could not be reconciled with retaining a primitive wilderness ar[illegible].

[22]We find no merit in appellants' argument that Congress should have banned all motorized travel if it were serious about protecting the wilderness. Congress retains the freedom, as well as the obligation and ability, to balance competing interests. Courts should not lightly set aside the resulting compromises.

[23]Other sections of the Act limit mining and timber activities and provide for limited visitor access to the wilderness.

stitution to pass needful regulations respecting public lands.[24]

III. *Tenth Amendment.*

Appellants assert that application of the motorized use restrictions to land and waters under state jurisdiction violates the limitation on Congress' power imposed by the tenth amendment.[25] We hold that the amendment presents no such bar.

In *Hodel v. Virginia Surface Mining & Reclamation Association, Inc.*, 101 S.Ct. 2352 (1981) (hereinafter *Virginia Surface Mining*), the Supreme Court articulated the test to be applied to tenth amendment challenges brought under the rationale of *National League of Cities v. Usery*, 426 U.S. 833 (1976).[26] The

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Court, in holding that environmental regulations of surface mining did not interfere with state police power, stated that a tenth amendment claim must satisfy three requirements:

> First, there must be a showing that the challenged statute regulates the "States as States." Second, the

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[24]Like the district court, we need not decide whether Congress could have enacted these regulations pursuant to its commerce clause or treaty making powers.

[25]The tenth amendment of the United States Constitution provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

[26]Because we decide that the tenth amendment does not bar this legislation, we may assume, without deciding, that the limits imposed on the exercise of Congress' power under the commerce clause apply equally to exercises of power under the property clause, a question left open in *National League of Cities*. *See National League of Cities v. Usery, supra*, 426 U.S. at 852 n. 17.

> federal regulation must address matters that are indisputably "attributes of state sovereignty." And, third, it must be apparent that the States' compliance with the federal law would directly impair their ability "to structure integral operations in areas of traditional functions." [*Hodel v. Virginia Surface Mining & Reclamation Association, Inc., supra*, 101 S.Ct. at 2366 (citations omitted).]

Appellants' challenge under the tenth amendment cannot be sustained. The restrictions on motorboats and snowmobiles do not regulate "States as States;" thus appellants' claim fails to satisfy the first requirement of the *Virginia Surface Mining* test.

The Supreme Court drew a sharp distinction

> between congressional regulation of private persons and businesses "necessarily subject to the dual sovereignty of the government of the Nation and of the State in which they reside," and federal regulation "directed not to private citizens, but to the States as States[.]" As to the former, we found no Tenth Amendment impediment to congressional action. [*Id.* at 2365 (citations omitted).]

The restrictions at issue here regulate the activities of private individuals. In prohibiting motorized vehicles in the BWCAW, Congress acted to regulate private conduct both on and off federal land, as necessary to protect that federal land.

The State argues that the motorized use restrictions interfere with its traditional role of regulating the water-

ways within the boundary waters."[27] The Supreme Court rejected a similar argument in *Virginia Surface Mining* and affirmed Congress' power under the commerce clause to displace the state's traditional police power of regulating land use. As the Court stated,

> [a]lthough such congressional enactments obviously curtail or prohibit the States' prerogatives to make legislative choices respecting subjects the States may consider important, the Supremacy Clause permits no other result. [*Id.* at 2367.]

The Court concluded:

> The Court long ago rejected the suggestion that Congress invades areas reserved to the States by the Tenth Amendment simply because it exercises its authority under the Commerce Clause in a manner that displaces the States' exercise of their police powers. * * * It would therefore be a radical departure from long-established precedent for this Court to hold that Tenth Amendment prohibits Congress from displacing state police power laws regulating private activity. [*Id.* at 2368.]

Appellants argue that the state "ownership" of the waters[28] distinguishes this case from the typical one. The state,

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[27]The Minnesota Supreme Court has long recognized the power of the federal government to displace state regulation of the boundary waters under Congress' commerce clause and treaty making powers. *See State v. Kuluvar*, 123 N.W.2d 699, 703 (Minn. 1963).

[28]A slightly different analysis may be required for regulation of conduct on state-owned land. However, even though the regulations might affect the state as a landowner, they remain essentially regulations of private conduct and not regulations of the state itself. To the extent they may be viewed as regulations of the state as state, appellants fail to show that the regulations would directly impair the state's ability to " 'structure integral operations in areas of traditional functions.' " *Id.* at 2366.

however, does not "own" the water within its borders in the same manner as it owns the land under those waters. Rather, as an aspect of sovereignty, the state has the power to control the use of those waters for the benefit of the public.[29] This authority, like any other state police power, however, must yield to any valid exercise of federal power.

[660 F.2d 1253]

To a significant degree, Congress recognized and demonstrated its respect for state sovereignty throughout the Act.[30] Section 15, especially, permits the state to exercise

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[29]Referring to wildlife, long subject to state "ownership," the Ninth Circuit stated: "A state's control over its resources, including wildlife, does not prohibit the proper exercise of federal power under provisions such as the commerce clause." *United States v. Helsley*, 615 F.2d 784, 788 (9th Cir. 1979).

[30]Sections 14, 15, and 16 of the Act provide:

Sec. 14. Nothing in this Act shall be construed as affecting the jurisdiction or responsibilities of the State with respect to fish and wildlife in the wilderness and the mining protection area.

Sec. 15. The Secretary is authorized to promulgate and enforce regulations that limit or prohibit the use of motorized equipment on or relating to waters located within the wilderness in accordance with the provisions of this Act: *Provided*, That nothing in this Act shall be construed as affecting the jurisdiction or responsibilities of the State with respect to such waters except to the extent that the exercise of such jurisdiction is less stringent than the Secretary's regulations promulgated pursuant to this section: *Provided further*, That any regulations adopted pursuant to this Act shall be complementary to, and not in derogation of regulations issued by the United States Coast Guard.

The Secretary is authorized to enter into cooperative agreements with the State of Minnesota with respect to enforcement of Federal and State regulations affecting the wilderness and the mining protection area.

Sec. 16. (a) The Secretary shall cooperate with the State of Minnesota and any political subdivision thereof in the administration of the mining protection area and in the administration and protection of lands within or adjacent to the mining protection area owned or controlled by the State or any political subdivision thereof. Nothing in this title shall deprive the State of Minnesota or any political subdivision thereof of its right to exercise civil and criminal jurisdiction within the wilderness and the mining protection area and

its traditional jurisdiction over the waters as long as state regulation is not less strict than federal regulation.

We conclude that the statute withstands the *National League of Cities/Virginia Surface Mining* test. The restrictions on the use of motorboats and snowmobiles regulate only private conduct, and not the state itself. The state retains broad jurisdiction over conduct occurring on state lands and waterways. We conclude, therefore, that the tenth amendment presents no bar to these restrictions.

Case No. 2

In case two, we consider appeals from two consolidated lawsuits brought by the National Association of Property Owners (NAPO) against the United States and the Secretary of Agriculture.[31] NAPO was joined, in part, by a group of local individuals and organizations,[32] Campbell's

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impose land use controls and environmental health standards on non-Federal areas within the wilderness and the mining protection area, or of its right to tax persons, corporations, franchises, or other non-Federal property, including mineral or other interests, in or on lands or waters within the wilderness and the mining protection area.

(b) The Secretary is authorized to enter into cooperative agreements with the State of Minnesota with respect to enforcement of Federal and State regulations affecting the wilderness and the mining protection and shall consult with the State of Minnesota in an effort to enhance the multiple-use benefits to be derived from both State and national forest lands. [92 Stat. 1657-58.]

In addition, §4(i) of the Act provides:

* * * Nothing in this Act shall prohibit the use of aircraft, motorboats, snowmobiles, or other mechanized uses in emergencies, or for the administration of the wilderness area by Federal, State, and local governmental officials or their deputies, only where the Secretary finds that such use is essential. [92 Stat. 1652.]

[31]NAPO also named the Chief of the United States Forest Service as a defendant in one of the cases.

[32]The group to be referred to as "Local Appellants" includes the National Park Inholders Association; Ely-Winton Boundary Waters Conservation Alliance; Local 4757 United Steelworkers of America; Greater Virginia Area Chamber of Commerce; Crane Lake Commercial Club; Minnesota Arrowhead Association; Ely Chamber of Commerce; Carolyn M. Fisher; Border Lakes Association; Crane Lake

Cabins and Trading Post, Ltd.. and the Lac La Croix Indian Band, as well as the State of Minnesota as intervenor. The Sierra Club intervenors joined in support of the United States.[33]

The factual history of the Boundary Waters Canoe Area and the 1978 Act has been detailed in case one. The legal issues on appeal will be divided according to ap-

[660 F.2d 1254]

pellants' three primary contentions. First, appellants allege that section 5 of the Act, which gives the United States a right of first refusal in certain property in the area, violates the takings clause and the due process clause of the fifth amendment. Second, appellants allege that, as applied to waters along the international border, the Act conflicts with two treaties between the United States and Canada, and that, by its own terms, the Act cannot be enforced. Third, appellants assert that the Act cannot be implemented until the Secretary of Agriculture files an environmental impact statement. We conclude that appellants' claims cannot be sustained, and, therefore, we affirm.

I. *Section 5 Challenge.*

Under section 5[34] of the BWCAW Act the United States

Voyager Snowmobile Club, Inc.; Crane Lake Sportsmen's Club; Charlotte Ekroot, d/b/a Windigo Lodge; Range Actioneers, Inc.; and City of Winton.

[33] *See* n. 3 *supra.*

[34] The full text of §5 provides:

Sec. (5) (a) The owner of a resort in commercial operation during 1975, 1976 or 1977 and located on land riparian to any of the lakes listed below may require purchase of that resort, including land and buildings appurtenant thereto, by written notice to the Secretary prior to September 30, 1985. The value of such resort for purposes of such sale shall be based upon its fair market value as of July 1, 1978, or as of the date of said written notice, whichever is greater, without regard to restrictions imposed by this Act:

has specific obligations and rights concerning lands in or near the boundary waters. Section 5(a) provides that resort operators on designated lakes may require the federal government to purchase their resorts for the fair market value. Section 5(c) grants the United States the right of first refusal on all other property riparian to the lakes listed in section 5(a). once the United States has purchased a resort under the terms of that section.

NAPO, the Local Appellants, and the State of Minnesota appeal the district court's decision upholding section 5(c) of the Act. Specifically, the parties assert (1) that section 5(c) represents an unconstitutional taking of property without just compensation; (2) that section 5(c) constitutes an unconstitutional delegation of legislative authority to private citizens; and (3) that section 5(c)

Fall, Lake County, Moose, Lake County, Snowbank, Lake County, Lake One, Lake County, Sawbill, Cook County, Brule, Cook County, East Bearskin, Cook County, Clearwater, Cook County, Saganaga, Cook County, Sea Gull, Cook County, McFarland, Cook County, North Fowl, Cook County, South Fowl, Cook County, Jasper Lake, Lake County, Ojibway, Lake County.

(b) An owner requiring purchase of a resort under this provision may elect to retain one or more appropriate buildings and lands not exceeding three acres, for personal use as a residence: *Provided*, That the purchase price to the Government for a resort shall be reduced by the fair market value of such buildings and lands, with the same valuation procedures outlined above.

(c) With respect to any privately owned lands and interests in lands riparian to the lakes listed above, and if the Federal Government has been required to purchase a resort on said lake, said lands shall not be sold without first being offered for sale to the Secretary who shall be given a period of one hundred days after the date of each such offer within which to purchase such lands. No such lands shall be sold at a price below the price at which they have been offered for sale to the Secretary, and if such lands are reoffered for sale they shall first be reoffered to the Secretary: *Provided*, That, this right of first refusal shall not apply to a change in ownership of a propery within an immediate family.

(d) There are authorized to be appropriated such sums as may be necessary for the acquisition of lands and interests therein as provided by this section. [92 Stat. 1652.]

should be read to apply only to land within the external boundaries of the BWCAW."

[660 F.2d 1255]

A. *Fifth Amendment Taking.*

Appellants assert that section 5(c), by establishing in the federal government a right of first refusal on designated property, constitutes a "taking" of property without just compensation. The Local Appellants claim that the statute in and of itself creates a cloud on the title of any property affected, and that the one hundred-day waiting period especially serves to diminish the value of the land by deterring potential buyers. Minnesota argues that the statute automatically creates an option in real prop-

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[35]We reject, with brief comment, a number of other issues raised by NAPO. NAPO first argues that §5 is unconstitutionally vague because subparagraph (a) fails either to define "resort" or to provide notice to other landowners of the United States' purchase of resorts, and because subparagraph (c) does not specify a one hundred-day limit on responses to reoffers made to the federal government. Many statutes, however, require administrative and judicial construction to clarify specific language. Such statutes are not unconstitutionally vague. Further, no party to this proceeding has alleged any harm resulting from any possible vagueness.

Appellants also assert that §5(a) is arbitrary because it provides a buy-out right to resort owners on only certain lakes. We cannot conclude, however, that Congress acted irrationally or arbitrarily in selecting the lakes it believed to be most seriously affected by the new Act. Neither is the Act suspect because Congress failed to include every business affected by the Act.

In addition, NAPO argues that §3 of the Act, which defines the BWCAW with reference to a "September 1978" map, is unconstitutional because no such map existed at the time the Act became law. NAPO, however, cites no evidence to contradict the congressional reference to the map in both the Act and the legislative history, or to upset the district court's finding that Forest Service officials have had custody of the map since passage of the Act. NAPO does remain free to correct any alleged irregularities in the map published in the Federal Register.

Finally, we find no support in the record to substantiate NAPO's claim of extrajudicial bias on the part of Judge Lord.

erty and, therefore, "takes" private property without compensation.

The Supreme Court recently reiterated its reluctance to rule on a challenge to the constitutionality of a statute on its face, particularly a claim alleging an unconstitutional taking of property. *Hodel v. Virginia Surface Mining and Reclamation Association,* 101 S.Ct. 2352, 2369-70 (1981). The Court stated:

> "[T]his Court has generally 'been unable to develop any "set formula" for determining when "justice and fairness" require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons.' Rather, it has examined the 'taking' question by engaging in essentially ad hoc, factual inquiries that have identified several factors—such as the economic impact of the regulation, its interference with reasonable investment backed expectations. and the character of the government action—that have particular significance." *Kaiser Aetna v. United States,* 444 U.S. 164, 175, 100 S.Ct. 383, 390, 62 L.Ed.2d 332 (1979) (citations omitted).
>
> These "ad hoc, factual inquiries" must be conducted with respect to specific property, and the particular estimates of economic impact and ultimate valuation relevant in the unique circumstances. [*Id.* at 2370.]

Like the Court in *Virginia Surface Mining,* we have before us no challenges to the actual application of section 5(c) to particular parcels of land.[38] We may consider,

[38]Should any individual owner believe that, as applied to his particular parcel, §5(c) constitutes an unconstitutional taking, he may bring suit for relief under the appropriate standards. *See generally Kaiser Aetna v. United States,* 444 U.S. 164 (1979); *Andrus v. Allard,* 444 U.S. 51 (1979); *Penn Central Transportation Co. v. New York City,* 438 U.S. 104 (1978).

therefore, only whether section 5(c) *on its face* constitutes an unconstitutional taking. Relying on the Supreme Court's opinion in *Andrus v. Allard*, 444 U.S. 51 (1979), we conclude that it does not.

In *Allard*, plaintiffs challenged the Secretary of the Interior's interpretation of the Eagle Protection Act and the Migratory Bird Treaty Act, which applied the Acts' prohibitions to birds lawfully captured prior to the effective dates of the Acts. Specifically, the regulations at issue stated that birds, their parts, eggs, or nests lawfully acquired "may not be imported, exported, purchased, sold, traded, bartered, or offered for purchase, sale, trade or barter * * *." *Id.* at 54. The Supreme Court recognized that this regulation could substantially affect the value of this property and its potential for profit, but concluded that compensation was not necessarily required. The Court held that "*the simple prohibition of the sale* of lawfully acquired property in this case does not effect

[660 F.2d 1256]

a taking," *id.* at 67-68 (emphasis added), reasoning:

> The regulations challenged here do not compel the surrender of the artifacts, and there is no physical invasion or restraint upon them. Rather, a significant restriction has been imposed on one means of disposing of the artifacts. But the denial of one traditional property right does not always amount to a taking. At least where an owner possesses a full "bundle" of property rights, the destruction of one "strand" of the bundle is not a taking, because the aggregate must be viewed in its entirety. [*Id.* at 65-66.]

In our view, the mere conditioning of the sale of property, as done with section 5, similarly cannot rise to the level of a taking. Even if some diminution in value results from the passage of section 5(c), any affect on the landowner's aggregate property rights would be minimal. Section 5(c) does not interfere with the owner's use or enjoyment of his property; it does not compel the surrender of the land or any portion thereof; it does not affect the owner's ability to give his property or to transfer it in any manner to members of his immediate family. Section 5 (c) may affect slightly an owner's ability to alienate property, but it has little effect on even that "strand" in the bundle of property rights.[37] We hold, therefore, that section 5(c), on its face, does not unlawfully take property in violation of the fifth amendment.[38]

B. *Unconstitutional Delegation.*

NAPO and Minnesota assert that section 5(c) constitutes an unconstitutional delegation of legislative authority to a private individual. They argue that, because the right of first refusal arises only after a resort owner demands that his land be purchased under section 5(a), Congress unlawfully delegated legislative power to resort owners. We reject this assertion.

The case law relied on by appellants does not support

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[37]In fact, we cannot conclude that the statute on its face necessarily will adversely affect the ability of landowners to sell their property. If the statute operates as intended, property owners will receive full value for their property either from the United States or a private purchaser.

[38]Alternatively, the availability of an individual remedy for just compensation under the Tucker Act, 28 U.S.C. §§1346(a) (2), 1491 (Supp. II 1978), may save the section from any alleged unconstitutionality. *See Union Carbide Agricultural Products Co., Inc. v. Costle,* 632 F.2d 1014, 1018-19 (2d Cir. 1980), *cert. denied,* 101 S.Ct. 1698 (1981).

their position. In those cases, private individuals possessed the power to limit owners' use of their own property. For example, in *Eubank v. Richmond*, 226 U.S. 137 (1912), under the challenged ordinance, owners of two-thirds of the property in an area, at their discretion and without standards, could set the building line for the rest of the property in their area. The Court invalidated the regulation, because

> [o]ne set of owners determine[s] not only the extent of use but the kind of use which another set of owners may make of their property. * * * The statute and ordinance [confer] the power on some property holders to virtually control and dispose of the proper rights of others * * *. [*Id.* at 143.][39]

Section 5 grants no power to one set of landowners to control either the extent or kind of use that others may make of their own property. Rather, Congress legitimately established a property regulation, the right of first refusal, and merely delayed its implementation until the occurrence of a contingency that Congress determined would make the regulation necessary. *See Currin v. Wallace*, 306 U.S. 1, 16 (1939). Congress itself established the restrictions affecting the property and gave no one discretionary power over neighboring landowners. Resort owners may choose wheth-

[660 F.2d 1257]

er to require the government to buy them out, but this right relates only to the resort owners' property. We con-

[39]Similarly, in *State of Washington ex rel. Seattle Title Co. v. Roberge*, 278 U.S. 116 (1928), the Supreme Court struck down an ordinance that gave property owners uncontrolled power to determine whether neighboring property could be used for a designated purpose.

clude, therefore, that Congress delegated no legislative power to private individuals.

C. *Application to Lands External to the BWCAW.*

Minnesota asserts that section 5(c), when properly construed, should apply only to lands within the boundaries of the BWCAW. Such an interpretation, however, conflicts with plain language of the statute. Section 5(c) applies to *any* privately owned property on lakes listed in 5 (a), making no distinction between land inside or outside of the BWCAW. Further, two of the lakes mentioned—Jasper Lake and Ojibway—lie entirely outside the BWCAW boundaries, so that their inclusion in section 5(c) necessarily implies that Congress intended the section to apply to lands outside the boundary waters area.

The State maintains that the plain language should be construed to apply to property only within the BWCAW because Congress provided no authorization to acquire land outside the boundary waters area. Minnesota argues that, because 5(c) contains no authorization to acquire lands, reference must be made to section 7(d) (1), which limits acquisition to land within the BWCAW. We believe, however, that section 5(c) when read with section 5(d), which authorizes funds to acquire lands as provided by section 5, grants independent authority to acquire property.[40] Thus, we conclude that section 5(c) applies to all lands riparian to the lakes listed in 5(a), whether inside or outside the boundaries of the BWCAW.

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[40]Section 5(d) provides:

(d) There are authorized to be appropriated such sums as may be necessary for the acquisition of lands and interests therein as provided by this section. [92 Stat. 1652.]

II. *Canadian-United States Treaties.*

The Local Appellants assert that section 4 of the Act, limiting the use of snowmobiles and motorboats in the BWCAW, cannot be enforced on the waters along the international boundary because the restrictions conflict with two treaties between the United States and Canada, the Webster-Ashburton Treaty of 1842, 8 Stat. 572, and the Root-Bryce Treaty of 1909 (Boundary Waters Treaty). 36 Stat. 2448. The Lac La Croix Indian Band and Campbell's Cabins and Trading Post, Ltd., also raise the conflict between the motor use restrictions and the Root-Bryce Treaty.

Appellants assert that both Treaties, by guaranteeing that the border waterways remain "free and open." grant individuals the right to engage in commerce in those waters and that the limit on motorboat use interferes with this right by preventing individuals from engaging in commerce. They argue that the restrictions cannot be applied to the waters along the international boundary because section 17 of the Act[11] operates as a saving clause, in effect voiding any section of the Act that conflicts with any treaty. The district court held that the provisions of the BWCAW Act are consistent with both treaties.[12] *National Association of Property Owners v. United States, supra,* 499 F.Supp. at 1251, 1272. We agree.

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[11]Section 17 of the Act provides:

> Nothing in this Act shall affect the provisions of any treaty now applicable to lands and waters which are included in the mining protection area and the wilderness. [92 Stat. 1658.]

[12]Alternatively, the court held that, to the extent any conflict exists, the terms of the Act would control over those in the treaty. We need not pass on this conclusion.

A. *The Webster-Ashburton Treaty.*

The Local Appellants assert rights arising from article II of the Webster-Ashburton Treaty:

> It being understood that all the water communications and all the usual portages along the line from Lake Superior to the Lake of the Woods, and also Grand Portage, from the shore of Lake Superior to the Pigeon River, as not actually used, shall be free and open to the use of the citizens and subjects of both countries. [8 Stat. 574.]

[660 F.2d 1258]

This section, however, does not preclude the governments of both Canada and the United States from enacting reasonable regulations affecting commerce along the waterways, as long as the regulations apply equally to citizens of both countries. As the Assistant Secretary of State wrote in response to questions about the effect of the Treaty on the Act,

> [w]e believe that the intent of the "free and open" provision for these waters was to ensure that this important route remained open, on an equal basis, to the nations of both countries. It would not be correct, however, to interpret "free and open" so broadly as to prohibit either United States or Canadian authorities from imposing any limitation upon the manner in which such waterways and portages may be used. In agreeing to free and open use of these waterways and portages, neither party intended to relinquish its sovereign role of imposing statutory

> limitations on behavior which would not be in the best interest of the respective country. [*National Association of Property Owners v. United States, supra,* 499 F. Supp. at 1234.][43]

Looking to the restrictions at issue, we conclude that they fall within the United States' retained sovereign power to regulate conduct on the waterways.

We are influenced by Canada's and the United States' determination of their powers under the Treaty. As the Supreme Court has explained, where ambiguities exist in a treaty "it is appropriate that we should look to the practical construction which has been placed upon it." *Pigeon River Improvement, Slide and Boom Co. v. Charles W. Cox, Ltd.*, 291 U.S. 138, 158 (1934).[44] By enacting section 17 of the Act along with section 4, Congress clearly indicated its belief that the Webster-Ashburton Treaty did not inhibit its power to preclude motor use along the international boundary.[45] Canada, as well, through the Province of Ontario, similarly banned mo-

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[43]Such executive interpretations of treaties are entitled to much weight. *See, e.g., Kolovrat v. Oregon,* 366 U.S. 187, 194 (1961); *United States v. Conners,* 606 F.2d 269, 272 (10th Cir. 1979); *Dupree v. United States,* 559 F.2d 1151, 1155 (9th Cir. 1977).

[44]In *Pigeon River,* the Supreme Court, in a limited opinion, held that the Webster-Ashburton Treaty did not

> preclude an improvement which would make a stream along the boundary available for use theretofore impossible, or to prevent a reasonable and non-discriminatory charge for the use of such an improvement. In the terms of the treaty we find no compelling clarity of prohibition. [*Id.*]

[45]By harmonizing the Act and the Treaty in this way, we may avoid finding that Congress impliedly abrogated this Treaty by enacting the BWCAW Act. *Cf. Torres v. Immigration and Naturalization Service,* 602 F.2d 190, 195 (7th Cir. 1979) (reconciling Selective Service Act with Spanish-American Friendship Treaty); *United States v. White,* 508 F.2d 453, 458 (8th Cir. 1974) (reconciling Indian Treaty with Bald Eagle Protection Act).

tor use of the waterways along much of the border, indicating its view that the Treaty permits each party to evenhandedly restrict use of motorboats on their side of the border.

This practical interpretation, given by the parties to the Treaty, is a reasonable one. We conclude, therefore, that the Webster-Ashburton Treaty does not conflict with section 4 of the BWCAW Act.

B. *Root-Bryce Treaty.*

Appellants make a similar argument with respect to the Boundary Waters Treaty of 1909. Article I of the Root-Bryce Treaty provides:

> The High Contracting Parties agree that the navigation of all navigable boundary waters shall forever continue free and open for the purposes of commerce to the inhabitants and to the ships, vessels, and boats of both countries equally, subject, however, to any laws and regulations of either country, within its own territory, not inconsistent with such privilege of free navigation and applying equally and without discrimination to the inhabitants, ships, vessels, and boats of both countries." [36 Stat. 2449.]

Appellants argue that the Treaty, by guaranteeing that the waters "shall forever con-

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[40]As the district court concluded, this section primarily insures that each sovereign may regulate conduct in the boundary waters as long as it acts in a non-discriminatory manner. The motorboat restrictions unquestionably operate evenhandedly.

tinue free and open for the purposes of commerce * * *," provides an independent guarantee of free and open navigation, beyond insuring nondiscriminatory regulation. Assuming that such a guarantee exists, we nonetheless conclude that the motor use restrictions fall within Congress' retained power to regulate commerce along the boundary waters.

As with the Webster-Ashburton Treaty, Congress had the 1909 Treaty before it and enacted section 4 along with section 17, indicating its belief that the Act fell within its power to regulate commerce in a manner "not inconsistent with the privilege of free navigation" guaranteed by the Treaty. Ontario, as well, by banning motor use on its border waterways, indicated its interpretation of the 1909 Treaty as not prohibiting such regulation. We cannot find such a construction arbitrary or unreasonable.

The Treaty allows sovereign states the flexibility to reasonably regulate commerce along the international borders. Although neither may completely close down intercourse between the countries, each has a wide latitude in regulating conduct in the area. Construing the action of Congress in 1978 in harmony with the Treaty of 1909, we conclude that the motor use restrictions fell within the United States' power, retained under the Treaty, to pass regulations consistent with free navigation.

III. *Environmental Impact Statement.*

NAPO asserts that the district court erred in failing to enjoin the implementation of sections 4 and 5 until the Secretary of Agriculture files an Environmental Impact

Statement (EIS) as required under section 102(2) (C) of the National Environmental Protection Act (NEPA), 42 U.S.C. § 4332(2) (C) (1976). The district court concluded that the Secretary need not file an EIS.

NAPO's argument rests on a basic misconception about the events necessary to trigger the requirements of NEPA. Section 102(2) (C) mandates that

> all agencies of the Federal Government shall—
> * * * *
>
> (C) include [an EIS] in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment * * *. [42 U.S.C. § 4332 (2) (C).]

For an EIS to be required, some future federal action, on which an EIS may have some effect, must be anticipated. The motorboat restrictions, however, do not contemplate any such action. These regulations automatically went into effect on January 1, 1979, by force of the Act itself. The Secretary had no discretion or power to circumscribe, delay, or expand the motorboat restrictions. Because the Secretary has no discretion to act, no purpose can be served by requiring him to prepare an EIS, which is designed to insure that decisionmakers fully consider the environmental impact of a contemplated action. *See State of South Dakota v. Andrus*, 614 F.2d 1190, 1193 (8th Cir.), *cert. denied*, 101 S.Ct. 80 (1980). *See also Andrus v. Sierra Club*, 442 U.S. 347, 350 (1979); *Minnesota Public Interest Research Group v. Butz*, 541 F.2d 1292, 1300 (8th Cir. 1976) (*en banc*), *cert. denied*, 430 U.S. 922 (1977).

NAPO, in reality, challenges the Act itself. The passage of an act of Congress, however, does not create an obligation to prepare an EIS, despite any significant environmental impact resulting from the legislation. NAPO would have the court impose an EIS requirement on Congress itself. Congress has not imposed such an obligation. We have no power to do so.[47]

Affirmed.

A true copy.

Attest:

CLERK, U.S. Court of Appeals, Eighth Circuit.

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[47]Although the pleadings are not clear, NAPO may also be claiming that an EIS is required under some sections, such as 4(e) (snowmobile restrictions) or 5(c) (option to purchase land), that grant the Secretary discretion in implementing the Act. To the extent that NAPO questions action under such sections, these challenges are not ripe for judicial consideration. The Secretary need not file an EIS until he makes a proposal or recommendation for federal action. *See Kleppe v. Sierra Club*, 427 U.S. 390, 406 (1976). NAPO points to no such plan, but rather alleges that, potentially, the Secretary's exercise of his power under the Act would have a significant environmental impact. The mere possibility of such hypothetical, potential impact does not give rise to the EIS obligation. *See id.; BRS Land Investors v. United States*, 596 F.2d 353, 355 (9th Cir. 1979); *Lake Berryessa Tenants' Council v. United States*, 588 F.2d 267, 272 (9th Cir. 1978). Appellant, of course, remains free to challenge any future plans for federal action under the BWCAW Act if issued without an EIS.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FIFTH DIVISION

Civil 5-79-95

National Association of Property Owners; National Park Inholders Association; Ely-Winton Boundary Waters Conservation Alliance; Local 4757 United Steel Workers of America; Lac La Croix Indian Band; Greater Virginia Area Chamber of Commerce; Crane Lake Commercial Club; Minnesota Arrowhead Association; Ely Chamber of Commerce; Carol M. Fisher; Border Lakes Association; Crane Lake Voyageur Snowmobile Club, Inc.; Crane Lake Sportsmen's Club; Ash River Namakan Lake Association; Charlotte Ekroot, d/b/a Windigo Lodge; Robert J. Handberg, d/b/a Campbell's Cabins and Trading Post;

Plaintiffs,

and

State of Minnesota,

Plaintiff-Intervenor,

vs.

United States of America; Bob Bergland, Secretary of Agriculture, individually and in his official capacity;

Defendants,

and

Sierra Club; Friends of the Boundary Waters Wilderness; League of Women Voters of Minnesota; Izaak Walton League of America, Inc.; Minnesota Rovers; Wilderness Inquiry II; Minnesota Environmental Control Citizens Association; Minneapolis Chapter, National Au-

dubon Society; St. Paul Chapter, National Audubon Society; Duluth Chapter, National Audubon Society; Minnesota Ornitholigists' Union; The Wilderness Society;

Defendant-Intervenors.

Civil 5-79-178

State of Minnesota by Joseph N. Alexander, its Commissioner of Natural Resources,

Plaintiff,

and

Carl Brown, d/b/a Walleye Bait & Tackle Co.; Viking Cruises, Inc.; Concerned Citizens of Northeastern Minnesota; Boundary Waters Landowners Association, a Minnesota non-profit corporation; Koochiching County; City of South International Falls; Village of Ranier; International Falls Chamber of Commerce; Minnesota United Snowmobilers Association, Inc.; City of International Falls;

Plaintiff-Intervenors,

v.

Robert Bergland, individually and as Secretary of Agriculture of the United States;

Defendant,

and

Sierra Club; Friends of the Boundary Waters Wilderness; Izaak Walton League of America, Inc.; The League of Women Voters of Minnesota, Inc.; Minnesota Rovers; Wilderness Inquiry II; Minnesota Environmental Control Citizens Association; Minneapolis

Chapter, National Audubon Society; St. Paul Chapter, National Audubon Society; Duluth Chapter, National Audubon Society; Minnesota Ornithologists' Union; The Wilderness Society;

Defendant-Intervenors.

Civil 5-80-25

National Association of Property Owners; Ely-Winton Boundary Waters Conservation Alliance; Range Actioneers, Inc.; Crane Lake Sportsmen's Club; City of Winton;

Plaintiffs,

v.

Bob Bergland, individually and in his official capactiy as Secretary of Agriculture; R. Max Peterson, individually and in his official capacity as Chief of the United States Forest Service;

Defendants,

and

Sierra Club; Friends of the Boundary Waters Wilderness; League of Women Voters of Minnesota; Izaak Walton League of America, Inc.; Minnesota Rovers; Wilderness Inquiry II; Minnesota Environmental Control Citizens Association; Minneapolis Chapter, National Audubon Society; St. Paul Chapter, National Audubon Society; Duluth Chapter, National Audubon Society; Minnesota Ornithologists' Union; The Wilderness Society;

Defendants-Intervenors.

[499 F.Supp. 1227]

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I. *INTRODUCTION*

Before the Court are parties' motions and cross motions for summary judgment in three separate lawsuits challenging Congress' most recent legislation concerning the Boundary Waters Canoe Area.

In *National Ass'n of Property Owners v. United States*, Civil 5-79-95 (D. Minn. 1979), plaintiffs challenge certain provisions of the Boundary Waters Canoe Area Wilderness Act (BWCAW Act), Pub. L. No. 95-495, 92 Stat. 1649 (October 21, 1978). This particular action raises five key issues:

1. Did Congress unlawfully delegate authority to the Secretary of Agriculture to draw the boundaries of the new Wilderness Area?

2. Does the Act, by limiting motorboat and snowmobile use in the Wilderness, discriminate, unconstitutionally, against the class of all handicapped persons and the class of all persons less physically fit?

3. Do §§4, by limiting motorboat and snowmobile use in the Wilderness, and 5, containing provisions for the purchase of properties around the BWCAW, of the BWCAW Act infringe plaintiffs' Ninth and Fifth Amendment rights?

4. Does the BWCAW Act conflict with the Webster-Ashburton Treaty of 1842?

5. Does alleged selective enforcement of the Act by the United States Forest Service give rise to any rightful claims by these plaintiffs?

In *Minnesota v. Bergland,* Civil 5-79-178 (D. Minn. 1979), the state and plaintiff-intervenors challenge the constitutionality of the BWCAW Act; their claim is essentially that the federal government has power to regulate only those lands and waters that it owns. Plaintiffs assert that certain sections of the Act, to the extent that they regulate lands and waters not owned by the federal government, violate the Tenth Amendment of the United States Constitution. The sole issue raised in this lawsuit concerns whether Congress is constitutionally empowered to regulate those surface waters and lands within the Wilderness Area not owned by the federal government.

In *National Ass'n of Property Owners v. Bergland,* Civil 5-80-25 (D. Minn. 1980), plaintiffs seek to enjoin the Secretary of Agriculture and the United States Forest Service from enforcing the 1978 Act. Plaintiffs allege that implementation of the legislation constitutes a major federal action significantly affecting the quality of the human environment, within the meaning of §102(2)(C) of the National Environmental Policy Act, (NEPA), 42 U.S.C. §4332(2) (C) (1976), necessitating the filing

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of an Environmental Impact Statement (EIS). The sole question raised in this cause concerns whether NEPA, in fact, requires these federal defendants to file an EIS prior to enforcing the BWCAW Act.

All issues have been extensively briefed and the Court has entertained counsel's oral presentations at two full

days of hearings. Now, after careful review of all the files, all memoranda and counsel's oral argument, the Court is prepared to rule.

II. *THE BOUNDARY WATERS CANOE AREA WILDERNESS*

A. *The History of the Area to 1978*

The BWCAW rests along the Minnesota-Canada Border for 110 miles. The Wilderness encompasses 1,075,000 acres.[1] East of the Rockies, it is the largest unit of the National Wilderness Preservation System; it is the second largest unit in the entire system. The BWCAW is the only lakeland canoe area in the entire nation. The area is made up of over 1,000 lakes, joined together by streams and portages. This area was the only means of travel for the legendary fur traders who navigated water routes pioneered by the Sioux and Chippewa.[2]

Notwithstanding the fact that extensive logging has occurred in the Wilderness Area, it still offers sanctuary to over 540,000 acres of virgin forests. This Wilderness is home to hundreds of species of unusual birds, plants and animals settled in scores of ecological communities. The area harbors such wildlife as the bald eagle, osprey, otter, beaver, moose, deer, snowshoe hare, porcupine, eastern timber wolf, pine marten, fisher and lynx. The boundary waters support sturgeon, pickerel, suckers and lake trout. Nearly every lake is populated by loons.

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[1]The 1978 Act enlarged the BWCA by 45,500 acres. This addition represented a compromise worked out in the Conference Committee. The original House bill sought to enlarge the Wilderness by 47,000 acres.

[2]For an historical appreciation of the Quetico-Superior area, *see* R. Newell Searle, *Saving Quetico-Superior—A Land Set Apart*, at 1-16 (Minnesota Historical Society Press 1977).

The dark forest is the keynote to the Wilderness, filled with jackpine and balsam fir. The forest is accented with feather mosses, stunted black spruce, labrador tea, swamp laurels and pitcher plants.

The extent to which the federal government has extended its protection over the Wilderness has varied for over 75 years. The history of federal involvement began back in 1902, 1905 and 1908, when the federal government set aside over one million acres of land as a federal forest reservation. In 1909, President Theodore Roosevelt established, by proclamation, the Superior National Forest.

In 1926, Secretary of Agriculture William M. Jardine created the first Superior Wilderness area, assuring that no roads would be constructed in at least 1,000 square miles of the best canoe country.

In 1930, Congress enacted the Shipstead-Newton-Nolan Act, 16 U.S.C. §577 *et seq.* (1976), which prohibited logging within 400 feet of any lakeshore, and regulated the waters and water levels within the Superior National Forest.

In 1948, Congress enacted the Thye-Blatnik Act, 16 U.S.C. §577c (1976), which directed the Secretary of Agriculture to acquire lands, or interests in lands, for the purpose of extending the wilderness canoe country. Also in 1948, the Forest Service established the Superior, Little Indian Sioux, and Caribou Roadless Areas, along with authorizing road construction and pulpwood timber sales in large areas previously promised to be kept free of roads by Secretary Jardine. In 1949, President Harry Truman issued Executive Order No. 10092 which established a 4,000 foot airspace reservation over the Wilderness.

In 1956, Congress authorized the appropriation of $9 million for the implementation of the Thye-Blatnik Act. *See* the Humphrey-Thye-Blatnik-Anderson Act of 1956, 16 U.S.C. §§577d-1, 577g-1 and 577h (1976).

In 1964, Congress passed the Wilderness Act of 1964, which forbade the use of motorized vehicles in almost all Wilderness

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areas. The Act, however, specifically excepted the BWCA from full Wilderness status. Section 4(d)(5) provided:

> Other provisions of this Act to the contrary notwithstanding, the management of the Boundary Waters Canoe Area shall be in accordance with regulations established by the Secretary of Agriculture in accordance with the general purpose of maintaining, without unnecessary restrictions of other uses, including that of timber, the primitive character of the area, particularly in the vicinity of lakes, streams, and portages; Provided that nothing in this Act shall preclude the continuance within the area of any already established use of motorboats.

16 U.S.C. §1133(d) (5) (1976). The original 1956 version of the Wilderness Act did not include this provision.

In 1965, Secretary of Agriculture Freeman promulgated a management plan for the BWCA pursuant to the directive in §4(d) (5) of the Wilderness Act. The Secretary designated 19 routes, covering over 100 lakes and 60 per cent of the area's surface water for both motorboat and snowmobile use. Secretary Freeman divided the

BWCA into an Interior Zone and a Portal Zone, closing all logging in the former and allowing such in the latter.

In 1978, Congress enacted the BWCAW Act, Pub. L. No. 95-495, 92 Stat. 1649 (October 21, 1978); plaintiffs in the instant actions challenge certain provisions of this Act which is Congress' last word on the BWCA.

B. *The 1978 Act*

The new Act redesignates the BWCA as the Boundary Waters Canoe Area Wilderness. The three units of the Wilderness are linked by a Mining Protection Area, which offers protection from the adverse effects of mining in the area. While the Act restricts motor usage in the Wilderness, the final version of the bill allows about half of the pre-Act motorboat usage to continue. About one-third of the water area of the BWCAW is now open to motorboat use. The 1978 Act lifts the snowmobile ban by authorizing the Secretary to permit snowmobile usage on two designated trails indefinitely and on three trails for up to five years.

The Wilderness' boundary is extended in the new Act by the addition of 45,500 acres. The Act also provides that qualifying resort owners may force the purchase of their property by the Secreary through September 1985. The Secretary, under certain conditions, is also granted the right of first refusal to acquire specified lands.

The 1978 Act phases out timber harvesting and maintains existing small dams in the area if necessary to protect wilderness values or public safety. The specific provisions challenged in the instant actions are more fully explored throughout the remainder of this Order.

III. *THE CASES*

THE FIRST CASE

A. *National Ass'n of Property Owners v. United States*, Civ. 5-79-95

1. *Facts*

a. *Parties*

The plaintiffs include two national organizations: the National Association of Property Owners, headquartered in San Antonio, Texas, and the National Parks Inholders Association, headquartered in Tahoe, California. These two plaintiffs object to the 1978 Act as it allegedly restricts the rights of their members to own, use, control, and dispose of their property.

Local plaintiffs include the Ely-Winton Boundary Waters Conservation Alliance; the Crane Lake Commercial Club, Inc.; Local 4757, United Steelworkers of America; Virginia Area Chamber of Commerce; Minnesota Arrowhead Association; Ely Chamber of Commerce; Border Lakes Association of Crane Lake; Crane Lake Voyageur Snowmobile Club, Inc.; Crane Lake Sportsman's Club, Inc., of Crane Lake; and Ash River Namakan Lake Association; which are all organizations based in northern Minnesota consisting of individuals who use the

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BWCAW or who own businesses on the periphery of the BWCAW.

Plaintiff Carol M. Fisher is a handicapped individual from Ely, Minnesota, who uses the BWCAW, and plaintiff Charlotte Ekroot is the owner of a resort on the Gun-

flint Trail near the BWCAW who claims the 1978 Act has injured her business.

Two plaintiffs own resorts in Canada. Plaintiff Robert J. Handberg is a resort owner on the north side of Lac La Croix, in Canada; and plaintiff Lac La Croix Indian Band consists of 240 individuals, some of whom are tourist guides on Lac La Croix, who are located, like Handberg, on the Canadian side of Lac La Croix.

Defendant Bob Bergland is the Secretary of Agriculture and, along with others, is charged with implementation of the 1978 Act. The United States of America is the other federal defendant.

Defendant-intervenors Sierra Club; Friends of the Boundary Waters Wilderness; League of Women Voters of Minnesota; Izaak Walton League of America, Inc.; Minnesota Rovers; Wilderness Inquiry II; Minnesota Environmental Control Citizens Association; the Minneapolis, St. Paul, and Duluth Chapters of the National Audubon Society; the Minnesota Ornithologists Union; and The Wilderness Society are all organizations whose members use the BWCAW. These groups were active in the passage of the 1978 Act. Many of the groups, including the Sierra Club, the League of Women Voters, the Izaak Walton League and The Wilderness Society, have been involved in preserving the wilderness aspects of the BWCAW from the early days of this century. Defendant-intervenor Wilderness Inquiry II provides canoe trips into the BWCAW for handicapped individuals.

b. *Procedural Posture*

This action was initially filed in the United States District Court for the District of Columbia. On July 17, 1979,

plaintiffs' motion for a temporary restraining order was heard by the Honorable Harold H. Greene, who denied that motion. Plaintiffs then dismissed their action without prejudice and refiled it in Minnesota. On August 7, 1979, Magistrate Judge Patrick J. McNulty heard plaintiffs' motion for a temporary restraining order and the defendant-intervenors' motion to intervene. On August 9, 1979, he granted the motion to intervene and recommended to this Court that the motion for a restraining order be denied. This Court denied the motion for a restraining order on August 28, 1979.

The defendant-intervenors moved to dismiss this action for failure to state a claim, or, in the alternative, for summary judgment on August 6. 1979. On August 24, 1979, the federal defendants followed suit. Arguments were heard by Magistrate Judge McNulty on September 10, 1979.

The plaintiffs moved to amend their complaint on September 28, 1979. The parties consented to amendment and the defendant-intervenors and federal defendants moved again for summary judgment. On October 29, 1979, the parties agreed that all the pending motions were submitted. Counsel for plaintiffs suggested that the Court delay resolution of this action as another action was to be filed by the State of Minnesota.

On December 27, 1979, the State of Minnesota filed a companion action challenging the constitutionality of the 1978 Act as an infringement of state water rights. *State of Minnesota v. Bergland,* Civil 5-79-178 (D. Minn. 1979).

On January 18, 1980, a third action was filed by the National Association of Property Owners and others con-

tending that the Secretary of Agriculture is required to promulgate an Environmental Impact Statement on implementation of the 1978 Act and asking that defendant Bergland be enjoined from implementing the 1978 Act. *National Ass'n of Property Owners v. Bergland,* Civil 5-80-25.

This Court formally referred all three actions to Magistrate Judge McNulty for hearing on March 27, 1980. At the request of counsel for plaintiffs in this action and counsel for the State of Minnesota, how-

[499 F. Supp. 1231]

ever, the Court recalled the three actions and set them all for hearing on April 17, 1980, and May 2, 1980.

On April 25, 1980, the State of Minnesota moved to intervene in the first action, Civil 5-79-95, on behalf of the National Association of Property Owners and the other plaintiffs. That motion was granted.

At the time of hearing, on May 2, 1980, the plaintiffs filed their motion for summary judgment in this action. There being no objection from the defendant-intervenors or the federal defendants to the plaintiffs filing their motion at that late date, the issues involved in this action are deemed submitted on cross-motions for summary judgment.

c. *Plaintiffs' Complaint*

The plaintiffs challenge the 1978 Act on numerous bases. Their challenges and the facts relevant to these challenges follow:

(1) *The First Cause of Action: The Map*

In plaintiffs' first cause of action, they state that Section 3 of the Act grants the Secretary of Agriculture the authority to establish boundaries and publish a map and legal description of the BWCAW. They then allege an unlawful delegation of legislative authority.

Section 3 of the Act itself states:

> The areas generally depicted as Wilderness on a map entitled "Boundary Waters Canoe Area Wilderness and Boundary Waters Canoe Area Mining Protection Area" dated September, 1978, comprising approximately one million and seventy-five thousand five hundred acres, are hereby designated as the Boundary Waters Canoe Area Wilderness . . .. The map of the wilderness shall be on file and available for public inspection in the offices of the Supervisor of the Superior National Forest and of the Chief, United States Forest Service. The Secretary of Agriculture . . . shall, as soon as practicable but in no event later than one year after the date of enactment of this Act, publish a detailed legal description and map showing the boundaries of the wilderness in the Federal Register . . .. Such map and description shall be filed with [the appropriate Congressional committees] . . .. Such map and description shall have the same force and effect as if included in this Act.

Pub. L. No. 95-495, 92 Stat. 1649, 1649-50 (1978).

Section 3 states that Congress had reference to a map—the map of September, 1978—when the Act was enacted;

the Act denominates the areas on that map as the Boundary Waters Canoe Area Wilderness.

Changes from the boundaries existent prior to the Act were described in great detail during the Congressional consideration of the bill. The Report of the House Committee illustrates the care with which Congress addressed possible boundary problems:

> The Committee notes that there has been much concern regarding the drawing of the exact boundaries of the wilderness. In order to eliminate any misunderstanding as to the location of the boundary, the Committee has supplied the United States Forest Service with detailed maps of the changes in the original BWCA boundary. These maps are to be used by the agency in preparing the final official boundary map for the wilderness. The Committee has also supplied the agency with detailed maps that make clear the points at which motor use is to be terminated on various lakes.

LEGISLATIVE HISTORY OF THE BOUNDARY WATERS CANOE AREA WILDERNESS (Pub. L. No. 95-495) at page 79 (December 1978) [hereinafter *Legislative History*]. This care extended to remedying technical problems with the pre-Act boundaries which had been brought to Congress' attention:

> The Committee has held to the principle of making no deletions from the established boundaries of the existing Boundary Waters Canoe Area Wilderness as created by the 1964 Wilderness Act. However, five minor flaws in the existing boundaries were

> brought to the Committee's attention. These have been corrected by small technical deletions. Three
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> [499 F. Supp. 1232]
>
> other small technical deletions were required to develop consistent and reasonable motorboat restrictions. These eight technical deletions are listed and described herewith . . ..

See Legislative History at 79-80.

This deliberateness continued in the Senate. The Report of the Senate Committee on Energy and Natural Resources notes that six changes were made in the boundaries proposed by the House and describes those differences in detail. *See Legislative History* at 240.

Even as late as the debate on the conference report, the bill's sponsors took pains to avoid any confusion about the boundaries. Congressman Burton, the floor manager of the bill in the House, stated during the debate:

> Certain other larger additions also include 400-foot shoreline additions along a portion of their perimeters to include all of the following lakes and river . . ..
>
> . . . .
>
> Detailed U. S. Geological Survey quadrangle maps showing each of these 400-foot lakeshore additions have been placed on file with the Chief, U. S. Forest Service, Washington, D.C., but, of course, it was difficult to accurately depict the 400-foot strips because of the limitations of map scales. The Senate report on H.R. 12250 already mentions these additions briefly, but I think it is important to describe the rationale and records involved in more detail so that there will be no confusion about them.

Legislative History at 299.

While the plaintiffs' first cause does not appear to challenge the location of motorboat and snowmobile routes—which are unlikely to be characterized as "boundaries"—the Court notes that such standards were provided by the statute and legislative history with equal, if not greater, clarity and detail. *See* §4 BWCAW Act, Pub. L. No. 95-495, 92 Stat. 1649, 1650-52 (1978). *See also Legislative History* at 78, 135, 145, 148-49, 231-32, 256-57, 261, and 267-69.

The device of establishing legal boundaries through a map reference has been utilized frequently by Congress. A review of recent park and Wilderness laws reveals an approach virtually identical to that taken by §3 of the BWCAW Act. *See, e.g.,* The Absaroka-Beartooth Wilderness, Custer and Gallatin National Forest Act, Pub. L. No. 95-249, 92 Stat. 162 (March, 1978); Chattahoochee River National Recreation Area Act, Pub. L. No. 95-344, 92 Stat. 474 (August, 1978); Eleanor Roosevelt National Historic Site Act, Pub. L. No. 95-32, 91 Stat. 171 (May, 1977).

(2) *Amended Count One—The Map*

In amended count one, the plaintiffs allege that the Secretary has failed to provide the map of September 1978 for public inspection and is attempting to publish an incorrect detailed map in the Federal Register. However, Betty Salerno, a member of the plaintiff Ely-Winton Boundary Waters Conservation Alliance, viewed the map of September 1978 in Washington, D.C., on July 11, 1979. *See* Affidavit of Betty Salerno, Civil 5-79-95 (D. Minn.

August 29, 1979). (Exhibit 3A of Plaintiffs' Memorandum in Support of Motion to Amend and Supplement Complaint.)

The Secretary tardily published the legal description of the BWCAW and a map, consisting of 21 detailed map sheets, in the Federal Register on April 6, 1980. The Federal Register stated that copies of the map sheets were available for purchase.

In this action, there are no allegations concerning boundary errors and no parties before the Court who claim to have property affected by an incorrect boundary designation.[3]

In §3 of the new Act, Congress itself designated the boundaries by use of the map of September 1978. Congress then required the Secretary to publish a legal description and map for the public in the Federal Register and make the legal description and maps available for public inspection. That has been done.

[499 F. Supp. 1233]

(3) *The Second, Third and Fourth Causes of Action: Motorboat and Snowmobile Restrictions*

The second, third, and fourth causes of action challenge those provisions of the 1978 Act regulating: (1) the lakes upon which motorboats may be used, (2) the horsepower limitations on lakes where motors may be used, and (3) snowmobile use in the Boundary Waters Wilderness. The regulation of motorized use is allegedly illegal because it: (1) violates the right to travel guaran-

[3]It appears that plaintiffs' only claimed inconsistencies concern motorized routes; motorized routes, however, are controlled by the words of the statute and not the map.

teed by the Due Process Clause of the Fifth Amendment, (2) disparages personal rights guaranteed by the Ninth Amendment, and (3) violates a treaty in force between the United States and Canada—presumably the Webster-Ashburton Treaty of 1842.

The 1978 Act purposefully and clearly regulates the use of motorboats and snowmobiles in the BWCAW. Congress' rationale for regulating motorized use, gleaned from the legislative history of the 1978 Act, follows.

Under the 1964 Wilderness Act and Department of Agriculture's Orders, and prior to the 1978 Act, designated motorboat and snowmobile routes included sixty percent (60%) of the BWCAWs water surface; paddling canoeists, skiers, hikers, and snowshoers had to compete with gasoline engines during at least part of their wilderness trips. Seventy percent (70%) of visitor use was by those who traveled by canoe, ski, or foot. For those who sought the enjoyment of an environment free from the intrusion of machines, encounters with motors could have been more than simply annoying. Numerous witnesses testified before the Congress on the shattering effect of motors on the solitude of the Wilderness and a wilderness experience. There was sufficient testimony before the Congress for it to conclude that the whine or roar of motors within a Wilderness destroys solitude. *See Legislative History* at 3, 11, 110, 112, 114, 116, 119, 128, 129, 131, 132, and 140.

For people who wish to use motorboats, dozens of large lakes are available to them immediately outside the BWCAW, among them Crane, Vermilion, Rainy, and Gunflint Lakes. Similarly, snowmobilers can legally travel on national and state forest lands, on state lakes,

in many state parks, and on thousands of miles of private and state trails. In contrast, those who desire to travel in a primitive, motor-free setting have only the BWCAW open to them. *See Legislative History* at 3.

While the 1978 Act does not completely ban motorboats and snowmobiles, it brings the BWCAW into line with other Wilderness areas where motorized uses are prohibited. Further, it brings the BWCAW into line with regard to the broad precepts set forth in the Wilderness Act. *See* 16 U.S.C. §1131(c) (1976).

(4) *Amended Count Three—Motorboat Restrictions*

Plaintiffs also assert that the selection of lakes where motorboat use is permitted is arbitrary and capricious. Congress' rationale was to continue motorized uses on the most heavily used and long established routes by resort guests; the selection was the result of much debate and compromise. *See generally Legislative History* at pages 119, 123, 129, 131, 140, 143-49, 248-49, 260-63, 279-80, and 302.[4]

(5) *The Fifth Cause of Action: The Webster-Ashburton Treaty*

In their fifth cause of action—and apparently, in their fourth—plaintiffs raise claims under the Webster-Ashburton Treaty of 1842. In their fourth cause of action, plaintiffs allege that the Act's prohibition of snowmobile use and imposition of motorboat horsepower restrictions for specific lakes deprive them of their "absolute" right to

[4]The plaintiffs also claim in various affidavits filed with the Court that the motorized use restrictions has hurt business. The Court notes there is presently no plaintiff before the Court asking for money damages under the Tucker Act.

travel internationally and violate "a treaty in force"—apparently the Webster-Ashburton Treaty—between the United States and Canada. In their fifth cause of action, plaintiffs again cite their "absolute" right

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to travel and allege that §17 of the new Act, which provides that the Act shall not affect the provisions of any treaty now applicable to the Boundary Waters Wilderness, violates the Supremacy Clause of the Constitution. They further allege that the Act directly conflicts with the Webster-Ashburton Treaty.

The Webster-Ashburton Treaty, 8 Stat. 572 (1842), was negotiated by Daniel Webster and Alexander Lord Ashburton to establish the boundary line between the United States and Canada. Article II of the Treaty, which describes the boundary for the area of Minnesota in question, concludes with the following provision:

> it being understood that all the water communications and all the usual portages along the line from Lake Superior to the Lake of the Woods, and also Grand portage, from the shore of Lake Superior to the Pigeon river, as now actually used, shall be free and open to the use of the citizens and subjects of both countries.

8 Stat. 572, 574 (1842).

Facts relevant to this claim include the following: Congress was aware that the province of Ontario had itself barred motorboats and snowmobiles in the Quetico Provincial Park, which adjoins the BWCAW along an exten-

sive portion of the international boundary, with the exception of a few lakes where motors can be used by the Lac La Croix Indian Band. *See Legislative Hostory* at 1-2, 89, 113, 124, and 140.

In addition, before passage of the Act, Congress sought and received advice from the State Department concerning the disputed provision of the treaty. In response to Congressman James Oberstar of Minnesota, Robert J. McCloskey, Assistant Secretary for Congressional Relations, unequivocally maintained that "[w]ith respect to your question on the use of mechanized transport on these waters, the Webster-Ashburton Treaty is clearly silent." Letter from Robert J. McCloskey to Hon. James L. Oberstar, Exhibit 7B to Affidavit of Dr. Miron L. Heinselman, *National Ass'n of Property Owners v. United States,* (D. Minn., July 28, 1979). Mr. McCloskey stated:

> At the time, the Webster-Ashburton treaty was signed, the waterways and portages of this area were an important route to the West. We believe that the intent of the "free and open" provision for these waters was to ensure that this important route remained open, on an equal basis, to the nations of both countries. It would not be correct, however, to interpret "free and open" so broadly as to prohibit either United States or Canadian authorities from imposing any limitation upon the manner in which such waterways and portages may be used. In agreeing to free and open use of these waterways and portages, neither party intended to relinquish its sovereign role of imposing statutory limitations on behavior which would not be in the best interest of the respective country.

Id.

(6) *The Sixth, Seventh and Eighth Causes of Action: Sales of Resorts to the Federal Government*

Section 5 of the Act provides for the following: If an owner of a resort on certain lakes denominated in the Act so desires, he may require the federal government to buy his property at fair market value as of July 1, 1978, or as of the date the owner gives notice to the Secretary. If the government is required to buy the resort, other lands on the lake may not be sold unless the lands are first offered to the Secretary. The Secretary has 100 days to decide whether to purchase the other land. If the Secretary decides not to purchase the other land at the offered price, it may not be sold to a third party at less than the offered price, unless it is first reoffered to the Secretary. An owner of a resort who requires the federal government to buy his land may retain three acres for his residence. The lakes to which the reoffer provision applies include thirteen lakes partly in and out of the BWCAW and two adjoining lakes.

The plaintiffs challenge (1) the right of first refusal provision on two grounds:

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first, as an unlawful delegation of legislative authority to an owner of a resort who requires the federal government to purchase his resort thereby activating the right of first refusal and, second, as a taking of property without just compensation (count six); (2) the reoffer provision as being vague, that is, plaintiffs are unsure if there is a 100-day limit on the reoffer provision (count seven); and (3) the three-acre provision as being arbitrary (count eight).

The *Legislative History* reflects the fact that Congress was very much concerned with the welfare of the local inhabitants. The Act thus contains provisions to assist the local population in adjusting to any inconveniences brought about by the Act's provisions. §§ 5 and 19 BWCAW Act, Pub. L. No. 95-495, 92 Stat. 1649, 1652 and 1659 (1978). Addressing this concern, Senator Wendell Anderson of Minnesota stated that: "Many of the provisions of [the Act] are specifically geared toward assisting local businesses in adjusting to the new management plan." *Legislative History* at 307.

Section 5(a) of the 1978 Act is unique in American law in that it gives a resort owner whose business may be affected by the Act *the right* to require purchase by the federal government.

Original versions of the 1978 Act placed all property on the designated lakes under a right of first refusal from the date of passage of the Act. *See Legislative History* at 54. The provision was eventually softened so as to trigger the right of first refusal only after the government invested in an initial resort; the government had no need for a right of first refusal until it had an investment in the land around a lake.

Further relevant facts have been introduced during the course of this litigation; the federal government has informed the Court that it intends to construe the reoffer period as limited to 100 days. Second, the government has informed the Court that it presently has no intention to exercise its right to first refusal on Fall Lake or Moose Lake, two designated lakes, allaying the fears of local property owners.

(7) *Amended Counts Six and Seven—Purchase Provisions*

The major contention in the added claims concerning §5 of the Act is that the selection of lakes subject to the favorable buy-out provision is arbitrary and capricious. Congress, however, debated hard and long before it settled on the present language of §5.

The house bill originally afforded thirteen lakes the favorable provisions. Each of the lakes was one on which motorboat restrictions were either to be imposed or which would be impacted. *See Legislative History* at 54. As to these lakes, the basis for selection is clear. With regard to the two lakes added to the original list of thirteen, Congress' rationale is likewise clear; the Act was intended to expand the boundaries of the Wilderness to include Wood Lake and the North Kawishiwi River, formerly outside the boundaries. Congress was concerned about the impact of the addition of these lakes on resorts that in the past had made a practice of storing boats for use by their customers on Wood Lake and the North Kawishiwi River, a practice banned within the boundaries:

> In several of the additions to the wilderness made by H.R. 12250 there has been limited seasonal and/or year-round storage of "cached" boats on lakes or rivers at sites that will be within the wilderness upon enactment. Storage of boats of all types not being used in connection with a current visit is currently prohibited on Federal land within the BWCA by the Secretary's regulations, and on State land or water under Minnesota Department of Natural Resources regulation 1,000. Such storage of cached boats or

> canoes is clearly out of keeping with the purposes of the Wilderness Act, and it is our intention that such practices be prohibited within the additions to the wilderness made by H.R. 12250.
>
> Storage of canoes just outside the wilderness boundary near certain lakes could be permitted by the Secretary as a means of facilitating appropriate wilderness use of such lakes by the guests of nearby re-
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> [499 F. Supp. 1236]
>
> sorts. ***In some cases such resort guests were the principal users of the cached boats within certain new wilderness additions.***
>
> ***Wood Lake and the North Kawishiwi River are examples of situations where canoe storage just outside the wilderness might help the resort economy and give resort guests an opportunity to fish in the wilderness with little portaging.***

Legislative History at 300 (emphasis added). Accordingly, the Senate added to §5 the two nearby lakes that supported resorts which had been storing boats on Wood Lake and on the North Kawishiwi River: Jasper and Ojibway. *See Legislative History* at 233.

Plaintiffs have come forward with no parties or affidavit by parties who claim they are resort owners on non-buy-out lakes who want to avail themselves of the favorable buy-out provision in §5.

There is also an added claim by plaintiffs to the effect that the Act, by failing to define "resorts," does not treat individuals on the §5 lakes fairly, arguing that those

property owners do not know whether their land is a qualifying "resort." However, presently no named plaintiff has come forward stating that he has approached the government pursuant to the Act's buy-out provision and that the government has told him he cannot avail himself of its provision because his land is not a resort.

(8) *Amended Count Seven—Additional Allegations Concerning the Right of First Refusal*

With regard to plaintiffs' other claims, they center upon impairment of property values. There is presently no *party* before the Court alleging that his or her property values have been impaired and asking for monetary relief.

(9) *Ninth Cause of Action: Allegations Concerning the Handicapped*

Plaintiffs claim that the Act violates Title VI of the 1964 Civil Rights Act and §504 of the 1973 Vocational Rehabilitation Act, and constitutional rights of the handicapped, as the handicapped need the assistance of motors to enjoy the BWCAW.

The debate surrounding passage of the 1978 Act addressed the practical concerns of the handicapped. One of the sponsors of the Act, Representative Fraser, introduced into the *Congressional Record* a letter that underscored the crux of this issue; that letter stated:

> The handicapped are no different from the rest of us . . .. To assume that only people with motors or hearty people need the solitude and peace of the true wilderness is a terrible injustice—a slam against the recreational and spiritual needs of all people.

Cong. Rec. E227 (daily ed. January 30, 1978).

The 1978 Act moves beyond the previous management scheme governing the Boundary Waters Wilderness in furnishing handicapped persons with greater opportunities. By eliminating motorboat use from some border lake chains, the Act in effect brings the wilderness—in the sense of a canoe-only zone—to the very edge of the BWCAW. A handicapped individual now has several routes on which the first lake is limited to non-motorized travel. Without motor restrictions, the handicapped are forced to travel across several lakes and portages to reach the solitude of wilderness.[5]

Programs are presently in operation that promote the use of the Wilderness by persons with handicaps. These programs help train the handicapped person in planning and executing trips into the Wilderness. In a statement made in the House of Representatives, Congressman Fraser called attention to one program of this kind operated by the Minnesota Outward Bound School. *See Cong. Rec.* H3161 (daily ed. April 6, 1977). Involving a ten-day course in which physically disabled and able-bodied persons participated in a rigorous regimen of "canoeing skills, expedition planning, physical conditioning, ropes course,

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wilderness emergency care, search and rescue training, rock climbing, and ecology," *Id.* at H3161, the program sought both to help handicapped individuals fully enjoy a wilderness trip and to "assist organizations, facilities,

[5]Even under the 1978 Act, many of the most heavily used entry points are on lakes where motors are still allowed in part as an accommodation to resorts, *e.g.*, Moose Lake, Fall Lake, Snowbank Lake, Seagull Lake, Clearwater Lake, and Lake Saganaga.

and agencies serving the physically disabled to establish outdoor adventure programs for their clients." *Id.*

During the House floor debate on the House Interior Committee bill, Congressman Nolan, a sponsor of the bill, described a second program structured to meet the recreational needs of handicapped individuals:

> I should like to briefly describe an organization whose expressed mission is to provide access to such wilderness areas to the handicapped. This organization calls itself the Wilderness Inquiry II and is one of three affiliate groups under the parent organization, the Wilderness Inquiry Association. Wilderness Inquiry II is designed to meet the recreational needs of the handicapped by providing access into such areas. It is intended that such excursions may be employed to assist handicapped individuals in coping with their disabilities by using the Wilderness as a means of developing self-confidence in themselves.

Legislative History at 128. Wilderness Inquiry II is a defendant-intervenor in this lawsuit.

The BWCAW Act also authorizes the Secretary to expand even further the opportunities for handicapped persons to use the Wilderness; §18(d) of the Act provides:

> The Secretary in cooperation with the State of Minnesota and other appropriate groups, consistent with the purposes of this Act, is authorized and directed to develop a program providing opportunities for a wide range of outdoor experiences for disabled persons.

§18(d) BWCAW Act, Pub. L. No. 95-495, 92 Stat. 1649, 1658-59 (1978). That the drafters of the legislation felt this to be an important provision is indicated by Congressman Burton's remarks during the House floor debate on the Interior Committee bill: "I have been pushing the Department generally, and do intend to produce effective policy to the end that these experiences are made more relevant to those with physical handicaps." *Legislative History* at 126.

Even though handicapped persons do use the Wilderness and even though programs do exist which are designed to foster even greater handicapped use, certain portions of the Boundary Waters Canoe Area Wilderness will remain inaccessible to some of the handicapped. Any wilderness, however, affords a continuum of recreational experiences; although some areas are easily reached by even the most uninitiated wilderness traveler, others can be visited only by those possessing consummate backcountry skills. In this respect, the handicapped and nonhandicapped stand on equal terms—both groups must tailor their expectations to the requirements of the terrain in which they intend to travel.

To protect and preserve the Wilderness, the 1978 Act sets out a management strategy under which no special dispensation is made for handicapped individuals; this strategy represents an approach that will guarantee to the handicapped individual the same opportunity provided the able-bodied, i.e., the chance to participate in a lakeland canoe wilderness experience, an experience unique to the BWCAW.

(10) *The Tenth Cause of Action: Discrimination Against the Less Physically Fit*

In this count, plaintiffs claim that the provisions of the Act regulating motorboat use allow only those who are in excellent physical condition and who are able to paddle a canoe to use the Boundary Waters Wilderness. Accordingly, plaintiffs claim the Act violates the equal protection guarantees in the Fifth Amendment to the federal Constitution and the motorboat restrictions are in conflict with the purposes of the Act.

(11) *The Eleventh Cause of Action: Alleged Selective Enforcement*

The plaintiffs last allege that certain prohibitions in the Act are being selectively enforced—specifically, one individual has

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been cited for violating motorboat restrictions while other motorboat violators have not been cited. This is claimed to be a violation of plaintiffs' equal protection rights.

There is no plaintiff in this action that is the subject of a citation.

2. *Discussion*

The United States, the defendant-intervenors, and the plaintiffs have all moved for summary judgment in *National Ass'n of Property Owners v. United States*, Civil 5-79-95 (D. Minn. 1979). This particular action raises numerous challenges to the present Act. The parties have exhaustively researched the relevant issues and have submitted scores of memoranda and affidavits both in sup-

port and in opposition to the pending motions and cross-motion. After careful review of the entire file, all moving memoranda and counsel's oral presentations, the Court determines that this action presents an appropriate case in which to order summary judgment; defendants' and defendant-intervenors' motions are granted; plaintiffs' motion is denied.[a]

a. *The Map*

Plaintiffs' first cause of action raises two questions. The first question does not rise to a constitutional challenge. The second question raises a significant constitutional issue, however, it was resolved long ago and against the plaintiffs' favor.

(1) *Which Map Establishes the Boundaries of the BWCAW?*

Plaintiffs have maintained that there is so much confusion concerning the actual boundaries of the Wilderness that the Act must fail. They hypothesize the possibility that Congress had before it a map other than that one designated in §3 of the Act as establishing the official boundaries of the Wilderness. In support of this postulation, plaintiffs' lead counsel, Mr. Wallis, has stated that he travelled all the way from San Antonio, Texas, to Washington, D.C., in order to view the official map. Once in Washington, Mr. Wallis spoke with two secretaries. He spoke with Ms. Holliday, secretary to the Deputy Chief

[a]Plaintiffs in this action moved for summary judgment on the basis that the 1978 Act interfered with the State of Minnesota's right to regulate water within the boundaries of the BWCAW, an issue not plead by plaintiffs in this action. For the reasons stated in *Minnesota v. Bergland* Civil 5-79-178, *infra*, plaintiffs' motion is denied.

of the Forest Service, and Ms. Clark, secretary to the Chief of the Forest Service. Neither Ms. Holliday nor Ms. Clark was able to satisfy Mr. Wallis' request; discontented, Mr. Wallis chose to leave. More patient men would have persevered, for the map was there.

Since January 1979, the official map has been retained by Messrs. Leasure and Joy of the Recreation Management Division of the United States Forest Service; since that time it has been available for inspection. Immediately after his short visit to the offices he could view the official map subsequent to his September trip to the nation's capital. It appears to the Court at this time that he'd rather curse the darkness than light a candle.

Congress identified the official map as that map entitled "Boundary Waters Canoe Area Mining Protection Area" dated September 1978. This map has been in the custody of the United States Forest Service since the enactment of the 1978 Act. It is available for Mr. Wallis' inspection. Furthermore, this "official map" and its more practical counterpart, published at 45 Fed. Reg. 23,006-23,040 (1980), are the only maps before the Court cloaked with statutory significance.

When reviewing any Congressional Act, this Court must presume that each public official who took part in the legislative process has done his duty properly and that the administrators have faithfully and effectively carried out the mandate of the Congress. Mr. Wallis' short trip to Washington and his brief inquiry there does not approach a showing which would amount to

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overcoming this presumption. *See Chacon v. Granata,* 515 F.2d 922, 925 (5th Cir. 1975), *cert. denied,* 423 U.S. 930 (1975).

(2) *Has Congress Unconstitutionally Delegated Its Power to Establish The Boundaries of The Wilderness?*

Plaintiffs contend that there has been an improper delegation by the legislature to the administrator of the Act because there are no adequate statutory *standards* set out in the Act to guide the administrator. Plaintiffs assert that §3 of the Act is an unconfined and vagrant abuse of the delegation power of Congress. In support of this proposition, plaintiffs urge a revitalization of the *Panama-Schechter* Anti-Delegation Doctrine. *Panama Refining Co. v. Ryan,* 293 U.S. 388 (1935); *Schechter Poultry Corp. v. United States,* 295 U.S. 495 (1935). This doctrine was laid to rest in 1944 when the Court issued its ruling in *Yakus v. United States,* 321 U.S. 414 (1944).

Since the *Panama* and *Schechter* cases, *supra,* federal delegations have been uniformly upheld. An extremely broad delegation which reached the Court after *Panama* and *Schechter* concerned the delegation contained in the Emergency Price Control Act of 1942, 50 U.S.C.A. App. §901, *et seq.* The Act authorized the Price Administrator to set maximum prices which in his judgment would be generally fair and equitable and would effectuate the purposes of the Act.

This delegation was challenged under the *Panama-Schechter* Doctrine; the Court, however, sustained the statute, reasoning that sufficiently precise standards were outlined in the Act. *Yakus v. United States,* 321 U.S. 414, 426 (1944). Dissenting, Mr. Justice Roberts noted that the standards articulated in the Act challenged in *Yakus, supra,* were no more precise than those struck down as limitless in *Panama* and *Schechter.* Justice Ro-

berts concluded that *Yakus, supra,* overruled the *Panama-Schechter* Doctrine. 321 U.S. at 452.

In *Amalgamated Meat Cutters & Butcher Workmen v. Connally,* 337 F.Supp 737 (D. D.C. 1971), a three-judge District Court considered the constitutionality of the delegation contained in the Economic Stabilization Act of 1970, Pub. L. No. 91-379, 84 Stat. 796 (1970). The Act authorized President Nixon to issue appropriate orders effectuating the stabilization of prices, rents, wages and salaries at levels less than those prevailing on May 25, 1970. The Act's delegation was standardless;[7] nevertheless the court sustained the Act against the claim of an improper delegation. 337 F.Supp. at 747-49. *Amalgamated Meat Cutters, supra,* is the culmination of the federal delegation cases; it assuredly indicates that with regard to delegation cases generally, the *Panama-Schechter* Doctrine is no more. *Amalgamated Meat Cutters, supra,* further ruled that the party who chooses to challenge Congress' choice of means for effecting its purpose shoulders the burden of persuasion which is met "[o]nly if we could say that there is an absence of standards for the guidance of the Administrator's action, so that it would be impossible in a proper proceeding to ascertain whether the will of Congress has been obeyed." 337 F.Supp. at 746 (quoting *Yakus v. United States,* 321 U.S. at 426). A heavier burden is hard to imagine.

Where fundamental personal rights are involved, it appears that a stricter standard of review is required by the courts in evaluating legislative delegations. In *Kent*

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[7]One commentator stated with regard to this Act: "If ever there was a delegation without standards, this was it." B. Schwartz, *Administrative Law* §18 at 46 (1976).

v. Dulles, 357 U.S. 116 (1958), the Court reasoned that a delegation of lawmaking power to an administrative agency which affects a person's fundamental right to travel abroad must be reviewed by the courts under the appropriately strict standard. *Id.* at 129. Typically, this situation would arise where an agency is authorized to issue permits for exercising associational

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rights protected under the First Amendment; this would include activities akin to parades and demonstrations. *See Shuttlesworth v. Birmingham,* 394 U.S. 147, 151 (1969).

In *Hander v. San Jacinto Junior College,* 325 F. Supp. 1019 (S.D. Tex. 1971), Judge Bue noted that while general grants of power to administrative agencies are permissible to regulate many forms of activity, certain types of activities may only be regulated pursuant to the law-making functions of a legislature—particularly where the activity regulated concerns the public's "personal liberties." The District Court reasoned that "[i]f that power is delegated, then there must be acceptable standards included within that delegation so that the agency can follow the policy of the statute." *Id.* at 1021 (citing *Zemel v. Rusk,* 381 U.S. 1 (1965); *Kent v. Dulles,* 357 U.S. 116 (1958)), *vacated,* 468 F.2d 619 (5th Cir. 1972). Essentially, Judge Bue's decision rests upon the premise that where "personal rights" are affected the legislature must determine the basic policy of the law; it is the power to set *policy* that may not be delegated to an agency. 325 F.Supp. at 1021.

In the case before this Court, there are two distinct rationales for rejecting the plaintiffs' argument:

1. Congress did not delegate policy making power to the Secretary in §3 of the Act; and

2. Even if §3 delegates authority to the Secretary, it is not standardless under the applicable case law.

Section 3 of the BWCAW Act provides:

> Sec. 3. The areas generally depicted as wilderness on the map entitled "Boundary Waters Canoe Area Wilderness and Boundary Waters Canoe Area Mining Protection Area" dated September 1978 comprising approximately one million and seventy-five thousand five hundred acres, are hereby designated as the Boundary Waters Canoe Area Wilderness (hereinafter referred to as the "wilderness"). Such designation shall supersede the designation of the Boundary Waters Canoe Area under section 3(a) of the Wilderness Act (78 Stat. 890) and such map shall supersede the map on file pursuant to such section. The map of the wilderness shall be on file and available for public inspection in the offices of the Supervisor of the Superior National Forest and of the Chief, United States Forest Service. The Secretary of Agriculture, hereinafter referred to as "The Secretary," shall, as soon as practicable but in no event later than one year after the date of enactment of this Act, publish a detailed legal description and map showing the boundaries of the wilderness in the Federal Register. Such map and description shall be filed with the Committee on Interior and Insular Affairs of the House of Representatives and the Committee on Energy and Natural Resources of the United States Senate. Such map and description shall

> have the same force and effect as if included in this Act. Correction of clerical and typographical errors in such legal description and map may be made.

§3 BWCAW Act, Pub. L. No. 95-495, 92 Stat. 1649, 1650 (1978).

This section does two things. It establishes the boundaries of the Wilderness by reference to the map Congress had before it, and it directs the Secretary to publish a legal description and more practical map in the Federal Register.[8] This section also authorizes the Secretary to make clerical and typographical corrections with regard to any errors in the description and the map.

It seems clear that this section of the Act does not delegate any authority to the Secretary; it merely directs the Secretary to publish a map of the boundaries already established by reference in the Act. Congress has determined the boundaries; the

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Secretary's only duty outlined in §3 is to *publish* the map of the boundaries.

If §3 were construed as a delegation, as opposed to a plain Congressional directive, it still remains that the section does not regulate "personal liberties"; accordingly the standard by which it must be judged is governed by *Yakus v. United States, supra,* and *Hander v. San Jacinto Junior College, supra.* Accordingly, such a delegation will be overturned *only* if this Court determines that it

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[8]The map which Congress had before it stands 12 feet by 5 feet and is presently available for inspection in the U.S. Forest Service. *See* Affidavit of Robert V. Potter, *National Ass'n of Property Owners v. United States,* Doc. No. Civil 5-79-95 (D. Minn. filed Sept. 10, 1979).

is *impossible* to ascertain whether the administrator's actions obey the will of Congress. I cannot conclude, by any stretch of the imagination, that §3, if it delegates at all, delegates to the extent that it is impossible for the Secretary to perceive Congress' will.

b. *Plaintiffs' Equal Protection Claims Regarding the Handicapped and the Less Physically Fit*

Plaintiffs allege that §4 of the Act, regulating the use of motorboats and snowmobiles in the Wilderness, is unconstitutional to the extent that it violates the Due Process Clause of the Fifth Amendment and the equal protection principles inherent in that constitutional guarantee;[9] and further that it infringes plaintiffs' Ninth Amendment rights.[10] Plaintiffs assert in the alternative that the 1978 Act conflicts with Title VI of the 1964 Civil Rights Act and the Vocational Rehabilitation Act of 1973, as amended, 29 U.S.C.A. §701 *et seq.* (Supp 1980), and that this conflict necessitates a determination by this Court that §4 can not be lawfully enforced. The Court finds that plaintiffs' ninth and tenth causes of action, raising these questions, fail to state claims for which relief may be granted, and, that as a matter of law, defendants and defendant-intervenors' motions for summary judgment must be granted.

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[9]It is a matter well decided that the Due Process Clause of the Fifth Amendment embodies equal protection principles. *Mathews v. DeCastro*, 429 U.S. 181, 182 n. 1 (1976); *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954); *Ellis v. HUD*, 551 F.2d 13, 16 n. 9 (3rd Cir. 1977); *Counts v. United States Postal Serv.*, 17 FEP Cases 1161, 1163 (N.D. Fla. 1978). *See also Weinberger v. Wessenfeld*, 420 U.S. 636, 643 (1975); *Schlesinger v. Ballard*, 419 U.S. 498, 505-06 (1975); *Johnson v. Robison*, 415 U.S. 361, 364 & n. 4 (1974); *United States Dep't of Ag. v. Moreno*, 413 U.S. 528, 532-33 & n. 5 (1973).

[10]Plaintiffs' Ninth Amendment claim is discussed at pp. 32-34, *infra*.

Plaintiffs' claims necessitate a three-part analysis of the challenged section. First, is the end constitutional; is Congress empowered to pursue the legislative goals sought through §4? Second, are the means chosen to effectuate these goals reasonably related to such a constitutionally permissible end; is there a rational basis for the means chosen by Congress? Third, does the challenged section violate another part of the Constitution?

It seems a matter well decided that Congress is constitutionally empowered to pursue the ends sought to be achieved in the 1978 Act. Congress outlined these goals in §2 of the Act; it sought to provide for such measures as would:

(1) provide for the protection and management of the fish and wildlife of the wilderness so as to enhance public enjoyment and appreciation of the unique biotic resources of the region,

(2) protect and enhance the natural values and environmental quality of the lakes, streams, shorelines and associated forest areas of the wilderness,

(3) maintain high water quality in such areas,

(4) minimize to the maximum extent possible, the environmental impacts associated with mineral development affecting such areas,

(5) prevent further road and commercial development and restore natural conditions to existing temporary roads in the wilderness, and

(6) provide for the orderly and equitable transition from motorized recreational

> uses to nonmotorized recreational uses on those lakes, streams, and portages in the wilderness where such mechanized uses are to be phased out under the provisions of this Act.

§2 BWCAW Act, Pub. L. No. 95-495, 92 Stat. 1649 (1978). Congress may constitutionally seek to achieve these goals; it may create and regulate Wilderness areas for recreational purposes for the public. *Izaak Walton League v. St. Clair,* 353 F.Supp. 698, 710 (D. Minn. 1973), *rev'd on other grounds,* 497 F.2d 849 (8th Cir. 1974); *Parker v. United States,* 309 F.Supp. 593, 597-98 (D. Colo. 1970), *aff'd* 448 F.2d 793, 795-96 (10th Cir. 1971), *cert. denied,* 405 U.S. 989 (1972); *McMichael v. United States,* 355 F.2d 283, 286 (9th Cir. 1965). *See also United States v. Gregg,* 290 F.Supp. 706, 707-08 (W.D. Wash. 1968).

Judge Neville, in *St. Clair, supra,* characterized the mining prohibitions in the Wilderness Act of 1964 as something in the nature of a zoning regulation. Judge Neville stated: "This court is satisfied, if it can be said that Congress intended to bar all mineral activities in the BWCA, that it has the power and prerogative so to do." 353 F.Supp. at 707. The District Court reasoned that the "Wilderness purpose" is a public one, and that the congressional proscriptions and regulations there involved were reasonable. *Id.* Judge Neville concluded that "Congress clearly had the power to zone the BWCA in view of

the public purpose to keep it virginal and untrammeled." 353 F.Supp. at 710.[11]

Accordingly, this Court determines that Congress has the *power* to designate the Boundary Waters as a Wilderness area, and to protect the "special qualities of the area as a natural forest-lakeland wilderness ecosystem". §1 BWCAW Act, Pub. L. No. 95-495, 92 Stat. 1649 (1978).

The Court further determines that the proscriptions enumerated in §4 of the Act, prohibiting or otherwise restricting the use of motorized vehicles in the Wilderness are reasonably related to creating and protecting the wilderness qualities of the Boundary Waters Canoe Area. The provision in the Act regulating the use of motorboats and snowmobiles has a rational basis, and is reasonably related to a constitutionally permissible end.

Plaintiffs assert that §4, which prohibits the use of motorized vehicles in the BWCAW, dicriminates against the handicapped and the less physically fit in violation of the Due Process Clause of the Fifth Amendment and the equal protection principles inherent in that clause.

Practically, every statute discriminates in some manner upon the rights or privileges of individuals or classes. For purposes of analysis, the Court must determine whether

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[11]The Court of Appeals for the Eighth Circuit reversed Judge Neville's Order enjoining the defendants from engaging in mineral exploration in the BWCA. The Eighth Circuit affirmed the District Court's determination that oCngress is empowered to enact such legislation. The basis for the reversal rested in the Appellate Court's determination that Congress did not inted to bar all mineral activity in the BWCA; the Court of Appeals ruled that the decision to issue mining permits for exploration in the Boundary Waters was left primarily with the Forest Service. The Eighth Circuit remanded the case to the District Court with directions to stay any further proceedings until after the Forest Service acted upon defendants' requests for permits to mine in the BWCA. *Izaak Walton League v. St. Clair*, 497 F.2d 849, 853-54 (8th Cir. 1974).

§4 discriminates against any "suspect" classes, or whether it infringes any person's "fundamental" rights; only after this initial determination is made, can the Court choose the appropriate standard of review. This Court finds that the present case does not involve the aforementioned "suspect criteria."

Statutes which allocate burdens upon, or otherwise discriminate against, blacks as a racial group have always been "suspect," and subject to strict judicial scrutiny. *See Loving v. Virginia*, 388 U.S. 1, 11 (1967). The number of "suspect classes" has grown in recent years to include other ethnic groups and aliens. *See Korematsu v. United States*, 323 U.S. 214, 216

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(1944); *Graham v. Richardson*, 403 U.S. 365, 371-72 (1971). *See also Developments in the Law—Equal Protection*, 82 *Harv. L. Rev.* 1065, 1087-1127 (1969); Note, 11 *Creighton L. Rev.* 609, 611-16 (1907). *See generally* Gunther, *The Supreme Court, 1971 Term—Forward; In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 *Harv. L. Rev.* 1 (1972).

Where a statute discriminates against one of these "suspect classes," it is subjected to strict review by the courts; judicial scrutiny under this standard requires that the challenged statute must further some compelling interest or be necessary to further an overriding purpose. *Loving v. Virginia*, 388 U.S. 1, 11 (1967). Few such statutes have survived this rigorous reviewing standard. *See Dunn v. Blumstein*, 405 U.S. 330, 363-64 (1972) (Burger, C.J., dissenting).

The present case involves a situation where the handicapped and less physically fit are somewhat burdened by the restrictions of §4. However, these classes of individuals are not "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process. *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973). This Court finds that the individual members of these classes of people do not constitute a "discrete and insular minority." *See Johnson v. Robison*. 415 U.S. 361, 375 n. 14 (1974). *See also Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 313 (1976). The handicapped are not a "suspect class." This Court is not the first to determine that physical disability is not a suspect class. *See Frontiero v. Richardson*, 411 U.S. 677, 686 (1973); *Carmi v. Metropolitan St. Louis* Sewer *District*, No. 79-1325 at 7 n. 9 (8th Cir. filed May 6, 1980); *Counts v. United States Postal Serv.*, 17 FEP Cases 1161, 1164 (N.D. Fla. 1978); *Vanko v. Finley*, 440 F. Supp. 656, 663 n. 14 (N.D. Oh. 1977). *See also Doe v. Colautti*, 592 F.2d 704, 710-11 (3d Cir. 1979). *See generally 2 Dorsen, Bender, Neuborne & Law, Political & Civil Rights in the United States* (4th ed. 1979).[12]

Having determined that the Act does not impact upon any "suspect" classes of people, what remains to be determined is whether the Act infringes any "fundamental" rights. If neither suspect criteria are affected, then the Act must only pass a reasonableness test.

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[12]Having determined that the physically disabled are not accorded special treatment, it follows that the less physically fit—the out-of-shape—are accorded even less protection from the majoritarian political process.

This Court determines that plaintiffs' right to utilize snowmobiles and motorboats in the wilderness is not a "fundamental" right.[13] It is further determined that §4 does not infringe any other fundamental rights possessed by these plaintiffs. Accordingly, the appropriate standard under which this section should be reviewed is the deferential rational basis standard. Under this standard, the challenged statute must be reasonable and not arbitrary, and will pass constitutional muster where any state of facts can reasonably be conceived that will sustain it, and the existence of such a state of facts must be presumed at the time of the enactment of the legislation. *See Graham v. Richardson,* 403 U.S. 365, 371 (1971); *McGowan v. Maryland,* 366 U.S. 420, 425-26 (1961); *State Bd. of Tax Comm'rs v. Jackson,* 283 U.S. 527, 537 (1931); *Rast v. Van Deman & Lewis Co.,* 240 U.S. 342, 357 (1916). *See generally*

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Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78-79 (1911); *Developments in the Law—Equal Protection.* 82 *Harv. L. Rev.* 1065, 1077-87 (1969).

The plaintiffs bear the burden of establishing that §4 does not pass the rational basis test. *Lindsley v. Natural Carbonic Gas Co., supra,* 220 U.S. 61, 78-79. Plaintiffs in the instant case have not cleared this hurdle; this Court finds that the Act's restrictions prohibiting, or otherwise regulating, the use of motorized vehicles in the Wilderness is reasonably related to the purpose of the 1978 Act, which is to create a wilderness area and otherwise protect and enhance the natural value and environmental

[13] *See* discussion at pp. 33-34, *infra.*

quality of the BWCAW. *See* §2 BWCAW Act, Pub. L. No. 95-495, 92 Stat. 1649 (1978). Accordingly, plaintiffs' equal protection claim must fail, and as a matter of law, summary judgment must be entered in favor of defendants and defendant-intervenors.[14]

c. *Plaintiffs Claims Challenging §§4 and 5 of the Act on Ninth and Fifth Amendment Grounds*

(1) *Plaintiffs' §4 Challenge*

Plaintiffs assert that §4 of the BWCAW Act, regulating the use of motorboats and snowmobiles in the Wilderness infringes certain personal rights constitutionally guaranteed them through the Ninth and Fifth Amendments. Section 4 of the Act provides:

> Administration
>
> Sec. 4. (a) The Secretary shall administer the wilderness under the provisions of this Act, the Act of January 3, 1975 (88 Stat. 2096; 16 U.S.C. 1132 note), the Wilderness Act of 1964 (78 Stat. 890, 16 U.S.C. 1131-1136), and in accordance with other laws, rules and regulations generally applicable to areas designated as wilderness.
>
> (b) Paragraph (5) of section 4(d) of the Wilderness Act of 1964 is hereby repealed and paragraphs

[14]Plaintiffs also assert that §4 violates Title VI of the 1964 Civil Rights Act and §504 of the Vocational Rehabilitation Act of 1973 as it denies handicapped persons of the benefits of a federally assisted program. The answer to this challenge is twofold. First, as described above, §4 does not deny handicapped persons of the benefits of the Wilderness area; it preserves those benefits. Second, a statute cannot violate another statute. If a conflict exists, the more specific statute or, alternatively, the one latter in time, governs. Accordingly, this contention does not state a claim. *See* discussion at pp. 40-41, *infra*.

(6), (7), and (8) of such section 4(d) are hereby redesignated as paragraphs (5), (6), and (7).

(c) Effective on January 1, 1979, the use of motorboats is prohibited within the wilderness designated by this Act, and that portion within the wilderness of all lakes which are partly within the wilderness, except for the following:

(1) On the following lakes, motorboats with motors of no greater than twenty-five horsepower shall be permitted: Fall, Lake County; Newton, Lake County; Moose, Lake County; Newfound, Lake County; Sucker, Lake County; Snowbank, Lake County; East Bearskin, Cook County; South Farm, Lake County; Trout, Saint Louis County; Basswood, except that portion generally north of the narrows at the north end of Jackfish Bay and north of a point on the international boundary between Ottawa Island and Washington Island; Saganaga, Cook County, except for that portion west of American Point; *Provided*: That, on the following lakes, until January 1, 1984, the horsepower limitations described in this paragraph shall not apply to towboats registered with the Secretary: Moose, Lake County; Newfound, Lake County; Sucker, Lake County; Saganaga, Cook County, as limited in this paragraph.

(2) On the following lakes and river, motorboats with motors no greater than ten horsepower shall be permitted: Clearwater, Cook County; North Fowl, Cook County; South Fowl, Cook County; Island River east of Lake Isa

bella, Lake County; Sea Gull, that portion generally east of Threemile Island, Cook County; Alder, Cook County; Canoe, Cook County.

(3) On the following lakes, or specified portions of lakes, motorboats with motors of no greater than ten horsepower shall be permitted until the dates specified: Basswood River to and including Crooked Lake, Saint Louis and Lake Counties, until January 1, 1984; Carp Lake, the Knife River, and Knife Lake, Lake County, until January 1, 1984; Sea Gull, Cook County, that portion generally west of Threemile Island, until January 1, 1999; Brule, Cook County, until January 1, 1994, or until the termination of operation of any resort adjacent to Brule Lake in operation as of 1977, whichever occurs first.

(4) On the following lakes, or specified portions of lakes, motorboats with motors of no greatter than twenty-five horsepower shall be permitted until January 1, 1984; Birch, Lake County; Basswood, Lake County, that portion generally north of the narrows at the north end of Jackfish Bay and north of a point on the international boundary between Ottawa Island and Washington Island.

(d) The detailed legal description and map to be published pursuant to section 3 of this Act shall contain a description of the various areas where the motorized uses permitted by this section are located. No provision of this section shall be construed to limit

mechanical portages or the horsepower of motors used on motorboats in the following areas within the wilderness:

Little Vermilion Lake, Saint Louis County; Loon River, Saint Louis County; Loon Lake, Saint Louis County; that portion of the Lac La Croix, Saint Louis County, south of Snow Bay and east of Wilkins Bay.

(e) For the purposes of this Act, a snowmobile is defined as any motorized vehicle which is designed to operate on snow or ice. The use of snowmobiles in the wilderness designated by this Act is not permitted except that the Secretary may permit snowmobiles, not exceeding forty inches in width, on (1) the overland portages from Crane Lake to Little Vermilion Lake in Canada, and from Sea Gull River along the eastern portion of Saganaga Lake to Canada, and (2) on the following routes until January 1, 1984:

Vermillion Lake portage to and including Trout Lake; Moose Lake to and including Saganaga Lake via Ensign, Vera and Knife Lakes, East Bearskin Lake to and including Pine Lake via Alder Lake and Canoe Lake.

In addition to the routes listed above, the Secretary may issue special use permits for the grooming by snowmobiles of specified cross-country ski trails for day use near existing resorts.

(f) The Secretary is directed to develop and implement, as soon as practical, entry point quotas for

use of motorboats within the wilderness portions of the lakes listed in subsection c, the quota levels to be based on such criteria as the size and configuration of each lake, and the amount of use on that lake: *Provided,* That the quota established for any one year shall not exceed the average actual annual motorboat use of the calendar years 1976, 1977, and 1978 for each lake, and shall take into account the fluctuation in use during different times of the year: *Provided further,* That on each lake homeowners and their guests and resort owners and their guests on that particular lake shall have access to that particular lake and their entry shall not be counted in determining such use.

(g) Nothing in this Act shall be deemed to require the termination of the existing operation of motor vehicles to assist in the transport of boats across the portages from Sucker Lake to Basswood Lake, from Fall Lake to Basswood Lake, and from Lake Vermilion to Trout Lake, during the period ending January 1, 1984. Following said date, unless the Secretary determines that there is no feasible nonmotorized means of transporting boats

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across the portages to reach the lakes previously served by the portages listed above, he shall terminate all such motorized use of each portage listed above.

(h) The motorized uses authorized by this section shall be confined to those types of snowmobiles,

> motorboats and vehicles which have been in regular use in the Boundary Waters Canoe Area prior to the date of enactment of this Act. The Secretary may set forth additional standards and criteria to further define the type of motorized craft which may be permitted.
>
> (i) Except for motorboats, snowmobiles, and mechanized portaging, as authorized and defined herein, no other motorized use of the wilderness shall be permitted. Nothing in this Act shall prohibit the use of aircraft, motorboats, snowmobiles, or other mechanized uses in emergencies, or for the administration of the wilderness area by Federal, State, and local governmental officials or their deputies, only where the Secretary finds that such use is essential.

§4 BWCAW Act, Pub. L. No. 95-495, 92 Stat. 1649, 1650-52 (1978). Essentially, this section prohibits the use of motorboats and snowmobiles except on specifically enumerated lakes and snowtrail routes. This section regulates the number and horsepower size of motorboats where specifically allowed, and permits snowmobile use only where the machine's width is 40" or less.

(i) *The Ninth Amendment*

The Ninth Amendment to the Constitution of the United States provides that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. Const. amend. IX. This amendment has never been used as a solid basis for any decision from the Supreme Court. The Ninth Amendment was heralded as one of several

sources from which a constitutionally protected privacy zone emanated. *See Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).

Mr. Justice Goldberg, concurring in *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965), reasoned that: "[t]he Ninth Amendment shows a belief of the Constitution's authors that *fundamental* rights exist that are not expressly enumerated in the first eight amendments and an intent that the list of rights included there not be deemed exhaustive." 381 U.S. at 492 (emphasis added).

In *Roe v. Wade*, 410 U.S. 113 (1973), the Court reviewed the "privacy" cases noting that there exists some zone of privacy within which reside several constitutionally protected rights; these rights, although not specifically enumerated in the Bill of Rights, are nonetheless deserving of special protection. *Id.* at 152-53. *Roe, supra*, however, reasoned that "only personal rights that can be deemed 'fundamental,' or 'implicit' in the concept of ordered liberty, are included in this guarantee of personal privacy." *Id.* at 152 (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)). *See also Roe v. Wade*, 314 F.Supp. 1217 (N.D. Tex. 1970).

To the extent that anything is clear about this Amendment, it seems apparent that only "fundamental" rights are somehow protected. Accordingly, if plaintiffs are entitled to any protection by the Ninth Amendment, it is forthcoming only to the extent that plaintiffs' "fundamental" rights are infringed.

In the instant case, the rights alleged to be infringed are plaintiffs' rights to operate motorboats and snowmobiles in the Wilderness. There are not many rights which have been considered "fundamental" by the Su-

preme Court; these special rights include: 1) the right to interstate travel, *Shapiro v. Thompson,* 394 U.S. 618, 638 (1969); 2) the right to procreate, *Skinner v. Oklahoma,* 316 U.S. 535, 541 (1942); 3) the right to choose a safe method of contraception, *Eisenstadt v. Baird,* 405 U.S. 438, 453-54

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(1972); 4) the right to marry, *Loving v. Virginia,* 388 U.S. 1, 12 (1967); and 5) the right to childrearing and education, *Pierce v. Society of Sisters,* 268 U.S. 510, 535 (1925). *See generally Roe v. Wade,* 410 U.S. at 152-53; Note, 11 *Creighton L. Rev.* 609, 612-13 (1977). Furthermore, the Court has indicated that the "fundamental personal rights" language in *Roe, supra,* should not be liberally construed. *See San Antonio School Dist. v. Rodriguez,* 411 U.S. 1, 29-34 (1973). Neither plaintiffs' counsel nor the Court have been successful in securing case law supporting the proposition that the right to operate motorboats and snowmobiles is fundamental. This Court determines that the right to operate motorized vehicles in the Wilderness is not fundamental. Accordingly, plaintiffs' Ninth Amendment claims, as a matter of law, must fail; defendants' and defendant-intervenors' motions for summary judgment with regard to plaintiffs' Ninth Amendment claims are granted.

(ii) *The Fifth Amendment*

Plaintiffs' Fifth Amendment challenge essentially raises the question whether the 1978 Act, regulating the use of motorboats and snowmobiles, infringes plaintiffs' substantive due process rights. There are certain personal

rights, not specifically enumerated in the Constitution, which are considered "the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." *Palko v. Connecticut*, 302 U.S. 319. 328 (1937). Traditionally, the Supreme Court, where it has sought to protect these unenumerated constitutional rights, has grounded the basis of such protection in the Due Process Clause. *See generally Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Aptheker v. Secretary of State*, 378 U.S. 500 (1964); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Roe v. Wade*, 410 U.S. 113 (1973).

The Due Process Clause, however, demands strict judicial scrutiny only where a person's "fundamental" right are infringed by Congressional action. This Court has already determined that the right to use motorboats and snowmobiles in the Wilderness is not a fundamental right. *See* discussion at page 33, *supra*. Accordingly, the standard by which this section must be reviewed is a "reasonableness" test. The question which this Court must consider is whether the legislation is reasonably related to a constitutional end.

The manner which Congress chooses to effectuate its constitutionally permissible goals is not a matter demanding strict review by the courts unless persons' fundamental rights are adversely affected by these congressional means. This Court must only consider whether the "motor" ban is reasonably related to effectuating Congress' intention to turn the BWCA into a Wilderness area. This Court finds that the motorboat and snowmobile restricions are reasonable, and that they further an otherwise constitutionally permissible goal. *See McGowan v. Maryland*, 366 U.S.

420, 425-26 (1961); *Williamson v. Lee Optical Inc.*, 348 U.S. 483, 489 (1955); *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78-79 (1911). Accordingly, plaintiff's Fifth Amendment claims must fail, and defendants' and defendant-intervenors' motions for summary judgment are granted.

(2) *Plaintiffs' §5 Challenge*

Plaintiffs allege as their sixth, seventh, and eighth causes of action that §5 of the Act operates as an encumbrance upon plaintiffs' property, infringing their right to own, control, and dispose of property in violation of the Fifth and Ninth Amendments. They claim further that §5(c)'s reoffer provision is vague and constitutes a

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taking in the constitutional sense. Finally, plaintiffs allege that §5(b), allowing resort owners to retain a three-acre homestead does not rest upon a rational basis. Plaintiffs' amended complaint alleges that the fact that the term "Resort" is not defined in the Act constitutes a deprivation of plaintiffs' procedural due process rights; that Congress' choice of lakes to which this section applies does not rest upon a rational basis; that the triggering mechanism for the government's right of first refusal constitutes an unlawful delegation; and that to the extent that §5(c) constitutes a "taking," the Act does not provide for adequate notice to all affected landowners.

Section 5 of the BWCAW Act provides:

Resorts

Sec. 5. (a) The owner of a resort in commercial operation during 1975, 1976 or 1977 and located on land riparian to any of the lakes listed below may require purchase of that resort, including land and buildings appurtenant thereto, by written notice to the Secretary prior to September 30, 1985. The value of such resort for purposes of such sale shall be based upon its fair market value as of July 1, 1978, or as of the date of said written notice, whichever is greater, without regard to restrictions imposed by this Act:

Fall, Lake County, Moose, Lake County, Snowbank, Lake County, Lake One, Lake County, Sawbill, Cook County, Brule, Cook County, East Bearskin, Cook County, Clearwater, Cook County, Saganaga, Cook County, Sea Gull, Cook County, McFarland, Cook County, North Fowl, Cook County, South Fowl, Cook County, Jasper Lake, Lake County, Ojibway, Lake County.

(b) An owner requiring purchase of a resort under this provision may elect to retain one or more appropriate buildings and lands not exceeding three acres, for personal use as a residence: *Provided,* That the purchase price to the Government for a resort shall be reduced by the fair market value of such buildings and lands, with the same valuation procedures outlined above.

(c) With respect to any privately owned lands and interests in lands riparian to the lakes listed above, and if the Federal Government has been re-

quired to purchase a resort on said lake, said lands shall not be sold without first being offered for sale to the Secretary who shall be given a period of one hundred days after the date of each such offer within which to purchase such lands. No such lands shall be sold at a price below the price at which they have been offered for sale to the Secretary, and if such lands are reoffered for sale they shall first be reoffered to the Secretary: *Provided,* That, this right of first refusal shall not apply to a change in ownership of a property within an immediate family.

(d) There are authorized to be appropriated such sums as may be necessary for the acquisition of lands and interests therein as provided by this section.

§5 BWCAW Act, Pub. L. No. 95-495, 92 Stat. 1649, 1652 (1978).

This provision, essentially, allows certain qualified resort owners to force a sale of their property to the Secretary at fair market value. It also permits the resort owners to retain a three-acre homestead if they are so inclined. Section 5(c) provides that where a resort owner has forced a sale on any of the qualifying lakes, then the remaining privately owned lands on that lake may not be sold to another purchaser unless the Secretary has first been offered the opportunity to purchase such lands. The Secretary has 100 days to exercise this right of first refusal. Further, if the landowner reoffers the land at a price lower than what was first offered to the Secretary, then the Secretary is, again, given right of first refusal as to the reoffer.

Plaintiffs' allegation raising Ninth Amendment claims must fail for failure to state a claim upon which relief

may be granted. As discussed previously, the Ninth Amendment extends the shield of constitutional protection only so far as to cover unenumerated "fundamental" rights. The Court has indicated that there are not

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many rights which have been provided special protection as fundamental and implicit in the nature of ordered liberty. This Court is reluctant to determine that the plaintiffs' right to dispose of their property without any governmental interference is fundamental and within the ambit of the Ninth Amendment's protection, particularly where another provision of the Constitution has traditionally been raised as an appropriate protector. It seems apparent to this Court that to the extent the operation of §5 constitutes an encumbrance upon plaintiffs' right to own and dispose of their property, the Takings Clause of the Fifth Amendment may more properly be invoked to redress plaintiffs' injury.[15]

Plaintiffs allege that since the Government's right of first refusal does not arise until after a qualifying resort owner forces a sale of a qualifying resort, the determination to "take" rests in the discretion of the private citizen, and not the federal government. Plaintiffs assert that this triggering mechanism constitutes an unlawful delegation to a private citizen.

The Court has previously discussed the Delegation Doctrine,[16] determining essentially that so long as the Legislature determines the basic policy of the law, any further delegation regarding its application is permissible. *See*

[15]*See* discussion of the Takings Clause at pp. 38-40 *infra*.
[16]*See* discussion at pp. 21-25 *supra*.

Hander v. San Jacinto Junior College, 325 F.Supp. 1019, 1021 (S.D. Tex. 1971). It is clear that Congress determined the basic policy of §5; it is only the triggering of the policy that turns upon the private resort owner's decision to force a sale under §5(a). Further, it seems apparent that no delegation is even contemplated by §5 of the Act. Once a qualifying resort owner forces a sale under this provision, the "right" of first refusal is triggered. With regard to whether the Secretary intends to exercise its right, the private resort owner has neither interest nor input. The determination to purchase under this right of first refusal is delegated to no one.

Plaintiffs also allege that §5 infringes their Fifth Amendment rights; they base their complaint upon the Due Process Clause and the Takings Clause. Plaintiffs' claim that the three-acre homestead provision does not rest upon a rational basis is untenable; a major concern of the sponsor of the compromise bill that became the 1978 Act was the welfare of the local residents. The Act was drafted in such a manner as to assist the local population in adjusting to any inconveniences occasioned by the new legislation; §5(b) is a paradigm example of how Congress sought to accommodate those persons specifically impacted by the new Act.

In accordance with the Act's new management plan, the local resort owners may elect to force a sale of their resorts under §5(a).[17] Congress determined that rather than

[17]With regard to plaintiffs' claims that the Act does not define "resorts" and, accordingly, does not treat property owners fairly, the simple answer is that presently no plaintiff has come forward and claimed that he has approached the federal government pursuant to §5 and that the government has told him his property is not a "resort." If one does and is rebuffed by the government, he may have an action, but his action is simply one to determine whether or not his property is a "resort" subject to §5's provisions; he does not have an action to declare the Act unconstitutional.

force these owners to leave the area completely, they should be given the opportunity to retain a three-acre homestead if they so choose to elect. By preventing the wholesale uprooting of these owners, §5(b) carries out the Act's objective of providing a smooth transition for local residents to the new management plan of the BWCAW. Accordingly, §5(b) is rationally related to a permissible congressional goal.

Plaintiffs' amended claim alleging that Congress' selection of the lakes to which §5(a) applies is arbitrary and capricious fails to state a claim for relief as well and, further, falls pursuant to the defendants' and defendant-intervenors' motions for summary judgment. The fifteen lakes listed in §5(c) are those lakes upon which the new motor restrictions either attach or im-

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pact, as well as those lakes upon which resorts had long past made a practice of storing boats for use by their customers—a practice now banned by the new Act. These lakes wene selected by Congress to facilitate an orderly transition for impacted resort owners to the new management plan for the Wilderness. Accordingly, §5(c) is rationally related to a permissible Congressional purpose. and rests upon a rational basis.

Plaintiffs' claim regarding the Takings Clause of the Fifth Amendment raises some serious concerns with the Court. Plaintiffs essentiaiiy argue that the triggering mechanism of §5(c) constitutes an encumbrance upon the impacted landowners' title to their property, and that such a restraint on alienation constitutes a "taking" in the constitutional sense.

The United States is empowered to "take" private property when such action is reasonably related to its other powers. *See Kohl v. United States,* 91 U.S. (1 Otto) 367, 372 (1875). The fundamental inquiry in "taking" jurisprudence concerns:

(1) whether the particular governmental intrusion is for a public purpose; and

(2) whether such regulation of private lands goes so far that it must be considered a "taking" in the constitutional sense, and therefore deemed invalid unless compensation is provided.

See Thompson v. Connsolidated Gas Utilities Corp., 300 U.S. 55, 78-80 (1937); *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 413 (1922). *Cf. Tennessee Valley Authority v. Welch,* 327 U.S. 546, 551 (1946); *Berman v. Parker,* 348 U.S. 26, 32-36 (1954). *See generally* Tribe, *American Constitutional Law* §9-2 at 458 and n. 10 (1978).

With regard to the first inquiry, this Court determines that §5(c)'s triggering mechanism is reasonably related to the permissible Congressional goal of faciliating an orderly transition for local landowners to the new Wilderness management scheme embodied in the 1978 Act. Congress had ample basis upon which to determine that the BWCA's metamorphosis into a Wilderness Park surely benefits the public. With regard to the second inquiry, it must be noted that what constitutes "going too far" is a problem which needs be determined on a case by case basis. The Court clearly contemplates that §5(c) may operate to restrict the ability of many landowners to transfer or otherwise alienate their property. Section 5(c) will in

all probability create a cloud on some landowners' titles and accordingly diminish the value of their property holdings. This diminution in value, where shown, is a taking; nothing in this Order will operate to restrict such a landowner—or a class of similarly situated landowners—from initiating an action in the form of an inverse condemnation proceeding and proving up damages occasioned by a taking or takings.[18]

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There are presently no landowners styled as plaintiffs in this case who raise takings claims by the operation of §5(c). Accordingly, the question of just compensation need not be addressed here. The Court will reserve its opin-

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[18]It would seem that any impacted landowner could pursue this method for relief immediately after the Government acquires a qualifying reso[illegible]; the mere acquisition triggers the right of first and second refusal, and it is this refusal right that may operate to cloud a property owner's title.

The issue of what constitutes a "taking" is a question governed by federal law; what constitutes "property" within the meaning of the Fifth Amendment is governed by state law. *Johnson v. United States*, 479 F.2d 1383, 1390 (Ct. Cl. 1973). The Minnesota Suprame Court has ruled that a zoning ordinance which adversely affects a landowner's ability to alienate his property at any place and at any time is a property right which cannot be materially interfered with without just compensation. *Sanderson v. City of Willmar*, 282 Minn. 1, 5-7, 162 N.W.2d 494, 497-98 (1968).

The Court contemplates that the effect of §5(c) may constitute a major impairment of plaintiffs' right to sell their property to anyone at any price they see fit. This Order does not restrict any such impacted landowner from instituting an inverse condemnation proceeding in the future, establishing that the right which he has to sell his property is significantly impaired, and proving up just compensation. The nature and extent of plaintiffs' loss must be determined on a case by case basis. If in such a case it is determined that the governmental intrusion is substantial and goes so far as to constitute a taking in the constitutional sense, then the owner so imposed may demand compensation for the lessened value of his property.

This Order, likewise, does not restrict the government from initiating its own condemnation proceedings and acquiring any property in this manner.

ion on this matter until an impacted landowner is actually before it, mindful that compensation is not constitutionally permissible until one of the landowners actually harmed by this statute initiates a lawsuit on his own behalf and proves up a taking claim.

These plaintiffs' takings claims fail to state a claim upon which relief may be granted. Accordingly, defendants' and defendant-intervenors' motions for summary judgment are granted; therefore plaintiffs' sixth and seventh causes of action are dismissed.[19]

d. *Plaintiffs' Claim Regarding the Webster-Ashburton Treaty of 1842*

Plaintiffs allege that the implementation of the 1978 Act would directly conflict with the Webster-Ashburton Treaty of 1842. Even presuming for the sake of argument that the challenged statute and the 1842 Treaty conflict, this claim does not state a cause of action for which a remedy is available. It is clear beyond doubt that where a later piece of legislation conflicts with an earlier enacted treaty, the statute controls. *See The Chinese Exclusion Case,* 130 U.S. 581, 600 (1889); *Whitney v. Robertson,* 124 U.S. 190, 195 (1888); *Head Money Cases,* 112 U.S. 580, 599 (1884). *See also United States v. Postal,* 589 F.2d 862, 878-79 n. 25 (5th Cir. 1979). *See generally*

[19]Plaintiffs also allege in their seventh cause of action that under the bare language of the statute the right of second refusal is indefinite and that such a fact in and of itself raises a taking claim. The United States has indicated that it construes the second refusal right no less limited in duration than its right of first refusal, *to wit,* 100 days. This Court deems that such a reading of the statute is not only reasonably warranted, but constitutionally necessary. In any event, until a proper partgy plaintiff is before this Court, the issue of a constitutional taking cannot be finally resolved. Likewise, plaintiffs' claim regarding proper notice under §5 is premature and need not be addressed at this time.

Gunther, *Constitutional Law, Cases and Materials* at 273 note (9th ed. 1975).

The United States Supreme Court has never abrogated the rule articulated in *The Chinese Exclusion Case*, 130 U.S. 581 (1889). There, Mr. Justice Field reasoned:

> If the treaty operates by its own force, and relates to a subject within the power of Congress, it can be deemed in that particular only the equivalent of a legislative act, to be repealed or modified at the pleasure of Congress. In either case, the last expression of the sovereign will must control.

Id. at 600. *See also Moser v. United States*, 341 U.S. 41, 45 & n. 9 (1951); *Clark v. Allen*, 331 U.S. 503, 508 (1947); *Diggs v. Schultz*, 470 F.2d 461, 465-66 & n. 4 (D.C. Cir. 1972).

Accordingly, plaintiffs' fifth cause of action as a matter of law must fail; defendants' and defendant-intervenors' motions for summary judgment are granted.[20]

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[20]Plaintiffs' fifth cause of action further claims that §17 of the States Act conflicts with the Supremacy Clause of Article VI of the United States Constitution and the §17 infringes plaintiffs' right to travel. These claims are likewise dismissed for failure to state a claim for relief. Plaintiffs claim a constitutional right to travel in and around the BWCAW, and internationally. The 1978 Act, however, does not deny them their right to travel throughout the Wilderness; it merely regulates the *manner* of travel. The historical methods of travel in the Wilderness are available to these plaintiffs; the Act does not flat out prohibit all modes of travel in the BWCAW. Courts have upheld reasonable restrictions on movement as constitutionally permissible. *See, e.g., Mathews v. Diaz*, 426 U.S. 67, 86 n. 26 (1976); *United States v. Davis*, 482 F.2d 893, 912-13 (9th Cir. 1973).

Plaintiffs' travel claim does not rise to a constitutional dimension. If the Court were to embrace this claim as a feasible, it would be, in effect, challenging all restrictions on movement from speed limits to Coast Guard boat regulations. Plaintiffs' claims based upon the Supremacy Clause of the United States Constitution also fail to state a claim for relief. It is clear that where a state statute or municipal ordinance conflicts with a treaty, the conflict must constitutionally be

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e. *Plaintiffs' Selective Enforcement Claims*

Plaintiffs allege that the Forest Service, the agency chiefly responsible for enforcing the restrictions ordered in the new Act, has selectively enforced the proscriptions of the BWCAW Act. Plaintiffs assert that such selective enforcement gives rise to a viable equal protection claim on their behalf. The Court is not moved by plaintiffs' assertions.

Standing, essentially, is the requirement that a party seeking relief in the federal courts have "a sufficient stake in an otherwise justiciable controversy." *Sierra Club v. Morton*, 405 U.S. 727, 731 (1972). *See also Wampler v. Goldschmidt*, 486 F.Supp. 1130, 1133 (D. Minn. 1980). The sufficiency of plaintiffs' stake turns upon two inquiries:

(1) Have plaintiffs alleged that the defendants' acts will cause them injury in fact; and

(2) Is the interest sought to be protected "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Association of Data Processing Service Org., Inc. v. Camp*, 397 U.S. 150, 152-53 (1970). *See also Rodeway Inns of America, Inc. v. Frank*, 541 F.2d 759, 763-65 (8th Cir. 1976); *Wampler v. Goldschmidt, supra.*

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resolved in favor of the treaty. *Asakwa v. City of Seattle*, 265 U.S. 332, 341 (1924). *See generally* Gunther, *Constitutional Law, Cases and Materials*, at 272 (9th ed. 1975). However, to the extent that a later enacted statute conflicts with a treaty, the Supremacy Clause does not even come into the picture, and the latter will of Congress controls. *The Chinese Exclusion Case*, 130 U.S. 581, 600 (1889).

Plaintiffs fail to satisfy the article III requirement of alleging injury in fact. Plaintiffs allege as their eleventh cause of action that "[d]efendant's agent, the United States Forest Service, has cited one individual several times for alleged violations of the Act, while ignoring other alleged offenders. This manner of selective enforcement is violative of Plaintiff's Fifth Amendment equal protection rights. . .." This is the extent of plaintiffs' allegation; no named plaintiffs have been cited for violation of the new Act. No named plaintffs have been the subject of discriminatory enforcement.

The Supreme Court has addressed the question plaintiffs pose to this Court. In *Linda R.S. v. Richard D.*, 410 U.S. 614 (1973), the Court stated that:

> The Court's prior decisions consistently hold that a citizen lacks standing to contest the policies of the prosecuting authority when he himself is neither prosecuted nor threatened with prosecution. See *Younger v. Harris*, 401 U.S. 37, 42 (1971); *Bailey v. Patterson*, 369 U.S. 31, 33 (1962); *Poe v. Ullman*, 367 U.S. 497, 501 (1961). Although these cases arose in a somewhat different context, they demonstrate that, in American jurisprudence at least, a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another.

Id. at 619. No named plaintiffs have been prosecuted or threatened with prosecution.

Even if it were the case that these plaintiffs were the subject of discriminatory treatment in the Forest Service's enforcement of this Act, they could not prevail on this claim unless it were established that such selective enforcement is based upon some constitutionally impermissible

ground such as race, religion, or the exercise of plaintiffs' first amendment guarantees. *Wheaton v. Hagan,* 435 F. Supp. 1134, 1148-49 (M.D. N.C. 1977). *See also Oyler v. Boles,* 368 U.S. 448, 456

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(1962); *United States v. Peskin,* 527 F.2d 71, 86 (7th Cir. 1975); *United States v. Oaks,* 527 F.2d 937, 940 (9th Cir. 1976); *United States v. Berrios,* 501 F.2d 1207, 1211 (2d Cir. 1974). Plaintiffs have neither argued nor even intimated that the Forest Service's alleged selective enforcement of the BWCAW Act is based upon these impermissible considerations.

There plaintiffs lack a sufficient enough stake in the controversy to satisfy Article III's injury in fact requirement. Accordingly, plaintiffs' eleventh cause of action is dismissed on the grounds that these plaintiffs lack standing to assert such a claim.

THE SECOND CASE

B. *Minnesota v. Bergland,* Civ. 5-79-178

The parties have filed motions and cross motions for summary judgment in the instant case. After careful review of the entire file, all memoranda and counsel's oral presentation, the Court determines that the plaintiffs' and plaintiff-intervenors' motions are denied and the defendants' and defendant-intervenors' motions are granted.

1. *Facts*

Counsel have stipulated that for the purpose of disposing of the instant matter, the following constitutes the relevant and undisputed facts:

1. *Description of the Boundary Waters Canoe Area Wilderness.*

1.1 *Surface Ownership.* The Boundary Waters Canoe Area Wilderness (BWCAW) is a part of the Superior National Forest in northeastern Minnesota. The total land and water area within the external boundaries of the BWCAW as established by Public Law 95-495 (1978 Act) is approximately 1,080,300 acres.[21] Approximately 792,000 acres of the land surface area within the external boundaries of the BWCAW are owned by the United States, approximately 121,000 acres of land surface area are owned by the State of Minnesota and various counties, approximately 7,300 acres of land surface area are privately owned, and approximately 160,000 acres are water area. The State of Minnesota owns the beds of navigable waters in the BWCAW. All of the waters listed in the 1978 Act are navigable.

1.2 *Mineral Interests.* The United States owns the mineral interests in approximately 44% of the area within the external boundaries of the BWCAW, the State of Minnesota owns the mineral interests in approximately 27% of the land and water area, and in the remaining approximately 29%, the mineral interests are privately owned.

2. *History of Superior National Forest and BWCAW.*

2.1 *Original Withdrawals.* The history of the Superior National Forest begins May 10, 1902, with

[21][Court's Note. Section 3 of the Act states that the Wilderness area comprises approximately 1,075,500 acres. The fact that counsel's stipulated facts differ in this regard presents no problem to the Court. Congress' approximation controls.]

a letter from General C.C. Andrews, chief fire warden of Minnesota, to the Commissioner, General Land Office, Washington, D.C., recommending that certain federal lands be set aside as a forest reservation under applicable federal statutes. Immediate action was taken to withdraw certain lands from all forms of disposal under the public land laws. The first withdrawal, dated June 30, 1902, covered essentially all of the area described in General Andrews' letter totaling approximately 490,440 acres. The second withdrawal, dated August 18, 1905, covered approximately 141,000 acres. The third withdrawal, dated April 22, 1908, covered approximately 518,700 acres.

2.2 *Establishment.* On February 13, 1909, by Proclamation No. 848, President Theodore Roosevelt established the Superior National Forest by reserving from settlement or entry and setting apart as a public reservation, for the use and benefit of the people, all the tracts of land previously withdrawn from disposal. Additional lands

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were made a part of Superior National Forest by further reservations in 1912 by Proclamation Nos. 1196 and 1215, in 1926 by Proclamation No. 1800, in 1927 by Proclamation No. 4889, in 1932 by Proclamation No. 5833, in 1936 by Proclamation No. 2213, and in 1962 by Executive Order No. 11072. Lands were first acquired for addition to Superior National Forest pursuant to the Weeks law of 1911,

Act of March 1, 1911, c. 186, 36 Stat. 961, 16 U.S.C. §515.

2.3 *Carhart Report.* In 1922, the Carhart Report was prepared for the Department of Agriculture recommending that the one million acres of the Superior National Forest be administered to develop the recreational use of the area to protect and enhance its lakeland quality, avoiding urban type, man-made developments such as roads and residential units which would detract from the area.

2.4 *State Lakeshore Withdrawn From Sale.* In 1923, the Minnesota legislature adopted Minn. Stat. §92.45 withdrawing from sale state lands bordering on meandered lakes and public waters and water courses, a substantial portion of which were located in the Superior National Forest area.

2.5 *Primitive Area Policy.* On September 17, 1926, the Secretary of Agriculture adopted a policy to set aside not less than 1,000 square miles of the Superior National Forest containing the best of the lakes and waterways to be kept as wilderness recreation areas. A primitive area policy was declared, the main provisions of which were (1) to retain as much wilderness as possible in association with the land having recreational opportunities, (2) to build no roads where the Forest Service exerts control, (3) to prevent commercial recreational developments, (4) to build simple campground facilities as needed to prevent escape of fire or protect sanitary conditions, and (5) to utilize the timber produced under careful methods of cutting that insure a continuous

timber supply with preservation of natural scenery along lakeshores, adjacent to campgrounds, and similar areas.

2.6 *Water Development.* In the 1920's and early 1930's, state officers and administrators, among others, appeared before the International Joint Commission in opposition to the hydroelectric project (Backus plan) proposed for the area. In 1929, the Minnesota legislature adoped a concurrent resolution urging the Congress to adopt the Shipstead-Newton bill then pending. In 1930, the governor of Minnesota urged adoption of the bill to prevent exploitation of border waters by private interests.

2.7 *Shipstead-Nolan Act.* In 1930, Congress adopted the Shipstead-Nolan Act, which, *inter alia,* prohibited officials and commissions of the United States from granting any permit, license, lease or other authorization to further alter the natural water level of any lake or stream within or bordering upon the area now within the BWCAW, unless autthorizations for each project were first obtained by special act of Congress. 16 U.S.C. §§577-577b.

2.8 *Little Shipstead-Nolan Act.* In 1933, the Minnesota legislature adopted the Little Shipstead-Nolan Act, (Minn. Stat. §110.13), prohibiting the construction of any dam or addition to any existing dam in any public stream or body of water within or bordering the areas covered by the federal Shipstead-Nolan Act unless specifically authorized by the legislature.

2.9 *Quetico-Superior Committee.* On June 30, 1934, President Franklin Roosevelt established the Quetico-Superior Committee by Executive Order 6783 to consult and advise with the various federal departments and agencies concerned and with the State of Minnesota, and to make recommendations on the proposed establishment of a wilderness sanctuary in the area.

2.10 *Superior Roadless Primitive Area.* In 1939, the Chief of the Forest Service approved a proposal for the establishment of the Superior Roadless Primitive Area. In 1941, the Forest Service established the first timber no cut zones totaling approximately 362,000 acres near the international boundary.

2.11 *Thye-Blatnik Act.* In 1947, the Thye-Blatnik Act was introduced in Con-

gress to authorize the acquisition of additional lands within the roadless areas, and the Minnesota legislature adopted a resolution urging Congress to pass the Act. The Thye-Blatnik Act was adopted in 1948. 16 U.S.C. §577c.

2.12 *Roadless Areas.* In 1948, the Forest Service established the Superior, Little Indian Sioux, and Caribou roadless areas in the Superior National Forest.

2.13 *State Air Ban.* In 1949, the Minnesota legislature designated the areas described in the Thye-Blatnik Act and the public waters therein or

bordering thereon, with certain exceptions, as a wilderness area and authorized regulation and control of aircraft and watercraft. Minn. Stat. §§84.43-84.52. Prosecutions of violations of this Act were commenced in August of 1949, four months prior to the federal air ban. The state air ban was suspended in 1951 during the continuance of the federal air ban. Minn. Stat. §84.521.

2.14 *Federal Air Ban.* Later in 1949, at the urging of Minnesota Governor Luther Youngdahl and Senator Hubert H. Humphrey, among others, President Harry S. Truman issued Executive Order No. 10092, 14 Fed. Reg. 7637 (Dec. 19, 1949), creating an airspace reservation below the altitude of 4,000 feet over the roadless areas.

2.15 *Humphrey-Thye-Blatnik-Andresen Act.* In 1956, Congress adopted the Humphrey-Thye-Blatnik-Andresen Act which extended the authority for the acquisition of additional lands in the area. 16 U.S.C. §§577d-1, 577g-1, 577h.

2.16 *Boundary Waters Canoe Area.* In 1958, the name of the roadless areas was changed to the Boundary Waters Canoe Area by the Department of Agriculture.

2.17 *Roads Closed.* In 1961, the Forest Service closed all roads on federal lands within the Boundary Waters Canoe Area to vehicular traffic.

2.18 *Wilderness Act.* In 1964, Congress adopted the Wilderness Act establishing a national wilderness preservation system to be composed of

federally owned areas designated by Congress as wilderness areas. National forest areas theretofore classified as "canoe" areas were designated as wilderness areas. With respect to the Boundary Waters Canoe Area, the Wilderness Act provided:

> Other provisions of this chapter to the contrary notwithstanding, the management of the Boundary Waters Canoe Area, formerly designated as the Superior, Little Indian Sioux, and Caribou Roadless Area, in the Superior National Forest, Minnesota, shall be in accordance with regulations established by the Secretary of Agriculture in accordance with the general purpose of maintaining, without unnecessary restrictions on other uses, including that of timber, the primitive character of the area, particularly in the vicinity of lakes, streams, and portages. Provided, That nothing in this chapter shall preclude the continuance within the area of any already established use of motorboats.

§4(d) (5) Wilderness Act, Pub. L. No. 88-577, 78 Stat. 895 (1964).

2.19 *Review Committee.* In 1964, the Secretary of Agriculture appointed the Boundary Waters Canoe Area Review Committee to review and make recommendations on the management of the area. The committee issued its report on December 15, 1964, recommending that the area be managed as a primitive type recreation area, and that the use of motorboats should be restricted by the establishment of three zones, a large motor zone, a small motor zone

and a no motor zone. The large motor zone included all waters having road access from outside the canoe area. The small motor zone (4 horsepower proposed) included waters accessible by not more than one portage and the international boundary from Lac La Croix to Saganaga. Regulations adopted by the Secretary of Agriculture on December 16, 1965 implemented a portion of the recommendations of the review committee.

2.20 *State Water Regulation.* In 1970, the Minnesota Department of Natural Resources issued regulations (N.R. 1,000) regarding use of state lands and waters within the Boundary Waters Canoe Area.

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2.21 *Mineral Exploration.* Since the late 1960's neither the United States nor the State of Minnesota has attempted to engage in mineral exploration in the BWCAW by drilling in the areas in which the respective governments own both surface and subsurface rights. The State of Minnesota has not issued any prospecting permits or mineral leases in the BWCAW, nor has it issued any permits to any other persons for roads across state lands, to cut state timber, to work in the beds of public waters, to appropriate public waters, or to use in any other manner, state-owned lands or waters in connection with private mineral exploration by drilling, nor has the state received any applications for permits to authorize such activities.

Between 1931 and 1945, permits for mining and

removal of minerals on public domain lands in the Superior National Forest were granted by the Secretary of Agriculture pursuant to a ruling of the solicitor for the department, which ruling was overruled by the solicitor in 1944. Following a change in the federal statutes relating to mineral exploration in 1950, the federal government issued a small number of limited prospecting permits within the boundaries of the BWCA during the 1950's. All outstanding permits affecting lands in the BWCA were terminated in 1965 by the Secretary of Agriculture pursuant to the recommendations of the BWCA review committee.

During the year 1969, the owner of mineral leases covering areas within the BWCA undertook surface mineral exploration within the BWCA with the knowledge and consent of the United States Forest Service. A base camp and several temporary encampments were set up within the BWCA by geologists who moved by canoe throughout the area. During the summer of 1969, the Forest Service permitted the mineral lease owner to enter the BWCA for purposes of surface exploration, using hand tools and visual observation, and authorized the establishment of a base camp for a period exceeding 14 days. After cessation of active exploration in September 1969, removal of the equipment was requested, but storage of the equipment at the campsite was continued without objection. In December 1969, the supervisor of the Superior National Forest was notified by letter that the owner of the mineral leases planned core drilling with the use of mechanical equipment and permanent camps.

Litigation was commenced by the Izaak Walton League of America against the owner of the mineral leases, the State of Minnesota, and the United States Department of Agriculture. The state cross-claimed against the owners and the federal defendants and requested a temporary restraining order to block further exploration. United States District Judge Phillip Neville ruled that the mineral exploration was illegal. The ruling was reversed by the Court of Appeals on jurisdictional grounds, further exploration was prohibited without a permit from the Forest Service, and the exploration was terminated and has not been renewed to date. *See, Izaak Walton League of America v. St. Clair,* 353 F.Supp. 698 (D. Minn. 1973), *rev'd* 497 F.2d 849 (8th Cir. 1974), *cert. denied,* 419 U.S. 1009 (1974). *See also Izaak Walton League of America v. St. Clair,* 313 F.Supp. 1312 (D. Minn. 1970); 55 F.R.D. 139 (D. Minn. 1976).

2.22 *State BWCA Act.* In 1976, the Minnesota legislature enacted Minn. Stat. §84.523 which provides, *inter alia*:

> Subdivision 1. Definition. For the purposes of this section, the term "boundary waters canoe area" means that area of lands and waters included within the boundaries designated in federal regulations REG U-3, 36 Code of Federal Regulations 293.16, as that regulation provided on January 1, 1975.
>
> Subd. 2. Intent. the legislature finds that a combination of state legislative and administrative

actions and court decisions have established a public policy of primarily wilderness management for state lands and waters within the boundary waters canoe area. This state policy, together with a similar federal policy and international actions consistent with

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these state and federal . . . policies, has created an area of hundreds of thousands of acres of land and water containing myriad lakes and streams, wooded shores, virgin forests, and other natural attractions of surpassing scenic beauty and solitude, free from substantially all commercial activities and artificial development such as hydroelectric dams and power lines, resorts, roads, sawmills, and timber harvesting in no-cut zones.

Subd. 3. Mining; prohibition. Except with the prior approval of the legislature in those cases of national emergency which have been declared by the Congress and which direct the need for exploration and mining of federal lands within the boundary waters canoe area, and after an investigation and determination by the commissioner of natural resources pursuant to subdivision 5 no state owned or administered land may be leased for exploration or mining of minerals, and no state permits, licenses or leases shall be issued to use any other state natural resources for any mineral exploration or mining operations in the boundary waters canoe area.

Minn. Stat. §84.523.

2.23 *Snowmobile Ban.* In September 1976, the Secretary of Agriculture affirmed a decision of the Chief of the Forest Service banning the use of snowmobiles in the BWCA.

2.24 *Motorboat Restrictions.* In 1977, the Regional Forester issued an order pursuant to the regulations of the Secretary restricting the use of the BWCA. *See* 36 C.F.R. §§261.17 and 293.16 (1979).

3. *Legislative History of the 1978 Act.*

3.1 *State Participation.* Following the introduction of legislation in Congress which ultimately led to the adoption of the 1978 Act, officials of the State of Minnesota actively participated in the legislative process and communicated their views orally and in writing to various member of Congress. The State of Minnesota was not permitted to participate in the negotiations in July 1978 leading to the "Dayton-Walls" compromise.

3.2 *Section 15 BWCAW Act.* Section 15 of the 1978 Act provides, in part:

> The Secretary is authorized to promulgate and enforce regulations that limit or prohibit the use of motorized equipment on or relating to waters located within the wilderness in accordance with the provisions of this Act: Provided, That nothing in this Act shall be construed as affecting the jurisdiction or responsibilities of the State with respect to such waters except to the extent that the exercise of such jurisdiction is less stringent than the Secretary's regulations promulgated pursuant

to this section: Provided further, That any regulations adopted pursuant to this Act shall be complementary to, and not in derogation of regulations issued by the United States Coast Guard.

§15 BWCAW Act, Pub. L. No. 95-495, 92 Stat. 1649, 1657 (1978).

The language of Section 15 was included in H.R. 12250, introduced on April 20, 1978, and in Senate bill S. 3242 introduced on June 23, 1978. (Section 15 as finally enacted appears as Section 14 in S. 3242). The report of the House Committee on Interior and Insular affairs on H.R. 12250 dated May 4, 1975, states:

> Section 15 authorizes the Secretary to issue and enforce regulations regarding motorized equipment on waters in the wilderness and recreation area. The state jurisdiction over these waters is to remain entirely unaffected, except where the exercise of that jurisdiction would be less stringent than the federal regulations promulgated to restrict motorized use. Any regulations adopted by the Secretary are not to conflict with the United States Coast Guard regulations. The Secretary may also enter into a cooperative agreement with the State of Minnesota for enforcement of various regulations.

Legislative History at 83.

The report of the Senate Committee on Energy and Natural Resources on the Senate bill S. 3242, on October 4, 1978, states:

> Both versions make it clear that nothing is to affect the jurisdiction of the State of Minnesota over the waters of the BWCA except that the Federal Government will enforce regulations on the use of motorized equipment on the waters in the wilderness as described in the Act.

Legislative History at 244.

Senator Wendell Anderson stated the following on the Senate floor on October 14, 1978:

> The State of Minnesota owns 26 percent of the surface area (land and water), in the Boundary Waters Canoe Area. There are over 1,000 bodies of water in the Boundary Water's Canoe Area. The State of Minnesota owns all of this water, as well as 10 percent of the wilderness land area. Jurisdiction over waters is a crucial matter of concern to the State of Minnesota. The State of Minnesota, since its creation has maintained jurisdiction over all the water within its boundaries. It is not the intent of this legislation to alter these jurisdictional rights which have been vested in the Sovereign State of Minnesota.
>
> Mr. President, I urge the Senate to accept this new management for this unique lakeland area and send it to the President for his signature.

Legislative History at 307.

4. *Quetico Provicial Park.*

4.1 *Use Regulation.* The BWCAW is compelmented in part on the Canadian side of the border

by the Quetico Provincial Park of Ontario, which was established originally in 1909. Commercial logging is prohibited in the park by the province of Ontario. Effective April 1, 1979, the use of motor powered watercraft on lakes, rivers and streams within the Quetico Provincial Park is prohibited, except that members of the Lac La Croix Indian band who are also members of the Lac La Croix Guiding Association may use motor powered watercraft to a total of 10 horsepower or less on Quetico, Beaverhouse, Wolseley, Tanner, Minn and McAree Lakes and Maligne River up to Tanner Lake for the purpose of guiding.

4.2 *Unregulated Canadian Waters.* The boundaries of the Quetico Provincial Park do not coincide with the boundaries of the BWCAW on the eastern and western extremities at the International border. The eastern boundary of Quetico Provincial Park meets the international border approximately at American point in Saganaga Lake. The Canadian portion of Saganaga Lake easterly of Saganaga along the international border are unrestricted as to motorboat use. The BWCAW extends easterly and southerly from American point along the international boundary approximately 15 miles to Magnetic Lake, and an additional approximately 30 miles along the international border from South Lake to North Fowl Lake. The western boundary of Quetico Provincial Park meets the international border at Bottle Portage at the most easterly point of Lac La Croix. All of the Canadian portion of Lac La Croix and all Canadian waters westerly of Lac La Croix along the internation-

al border are unrestricted as to motorized use, and are currently used for seaplane operation as well as motorboat operation. The BWCAW extends westerly along the international border from Bottle Portage approximately 40 miles through Lac La Croix, Loon Lake, Loon River, and Little Vermillion Lake.

5. *Forest Service Orders After 1978 Act.*

5.1 On January 2, 1979, the Regional Forester, Eastern Region, Forest Service, issued an order prohibiting possession or use of snowmobiles in the BWCAW, except on the routes designated in Section 4(e) of the 1978 Act.

5.2 On April 30, 1979, the Regional Forester, Eastern Region, Forest Service, issued an order prohibiting possession or use of motorboats in the BWCAW except as authorized in Section 4(c) and 4(d) of the 1978 Act.

5.3 Pursuant to Section 4(f) of the 1978 Act, the Forest Service established entry point quotas for use of motorboats in the BWCAW in 1979 on lakes listed in Section 4(c) of the 1978 Act.

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6. In 1979, the Forest Service issued a map showing the motorized use restrictions established by the 1978 Act for the information of users of the BWCAW.

7. The total number of individual paddle canoeists from outside Minnesota who used the BWCAW in each of the last four years is as follows:

1976:	38,298
1977:	39,803
1978:	42,169
1979:	43,613

The total number of individuals from outside Minnesota who used the BWCAW for all purposes in each of the last four years is as follows:

1976:	57,217
1977:	48,197
1978:	63,710
1979:	59,253[22]

2. *Discussion*

The plaintiffs' complaint alleges, in essence, that Congress is without authority to regulate lands and waters which it does not own. Building from this basic premise, the state and plaintiff-intervenors assert that §§4(c), (e), (f), and (i) as well as §15 are lawfully unenforceable because these statutory provisions regulate lands and waters not owned by the United States, thus infringing those powers retained by the state under the Tenth Amendment. Plaintiffs' prayer requests a declaration that the restrictions in the 1978 Act apply only to lands and waters actually owned by the federal government or that these sections are unconstitutional.

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[22]This statement of the facts has been taken almost entirely from counsel's "Stipulation of Facts Dated May 1, 1980." Where the Court deemed it necessary, it inserted corrected citation forms; other citations have been omitted entirely. The Court has also made certain limited grammatical changes in the parties' Stipulation. For an unabridged copy of the parties' stipulation, *see Stipulation of Facts*, Doc. No. Civil 5-79-178 (D. Minn. filed May 20, 1980).

The sole issue raised in this case concerns whether Congress is constitutionally empowered to enact legislation which regulates lands and waters not actually owned by the United States. The Court addressed this question briefly in the discussion section of the order dealing with the first case. *See* pages 26-27, *supra*. The Court reaffirms its determination that Congress has the power to regulate all lands and waters in the Wilderness Area to promote the purpose of the BWCAW Act; a more fully-developed analysis follows.

The United States Congress is a lawmaking body of specifically enumerated powers. Simply stated, if the Constitution does not give Congress the power to engage in certain activity, then Congress may not so act. The United States Constitution creates and limits the power of the Congress; it establishes and lists the lawmaking powers of the federal government. *See* Tribe, *American Constitutional Law*, §5-1 at 224 (1978). If the challenged Act withstands review in this Court, it is because there is a specifically enumerated constitutional provision which provides the necessary power source for the BWCAW Act. Defendants and defendant-intervenors have identified several possible Congressional power sources, any one of which, if it grants Congress the appropriate power, may be raised to sustain the 1978 Act; they include: the Property Clause, U.S. Const. art. IV, §3, cl. 2; the Commerce Clause, U.S. Const. art. I, §8, cl. 3; and the Treaty Making Power, U.S. Const. art. II, §2, cl. 2.

(a) *The Property Clause*

The Property Clause of the United States Constitution provides in relevant part that, "The Congress shall have

Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States. . . ." U.S. Const. art. IV, §3, cl. 2. Congress, in enacting the BWCAW Act, has determined to protect the special qualities of the BWCAW as a natural forest-lakeland wilderness; it has sought to accomplish this goal by, among other things, prohibiting or otherwise regulating the use of motorized vehicles in the Wilderness. The question which arises under the Property

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Clause concerns whether "this determination can be sustained as a 'needful' regulation 'respecting' the public lands." *Kleppe v. New Mexico*, 426 U.S. 529, 536 (1976). In this regard, the Court has stated, "[i]n answering this question, we must remain mindful that, while courts must eventually pass upon them, determinations under the Property Clause are entrusted primarily to the judgment of Congress." *Id.* at 536. *See United States v. San Francisco*, 310 U.S. 16, 29-30 (1940); *Light v. United States*, 220 U.S. 523, 537 (1911); *United States v. Gratiot*, 39 U.S. (14 Pet.) 526, 537-38 (1840).

There are three sub-questions posed in the present case: (1) are the Act's restrictions needful rules; (2) Do these rules "respect" federal lands; and (3) Even if the Act's regulations are needful rules respecting federal land, can such regulations be enforced as to state and privately owned land? *Kleppe, supra*, indicates that questions (1) and (2), *supra*, are presumed by the Congressional finding.[22] The

[22]Congress has determined that regulation of motorized uses on lands and waters within the boundaries of the BWCAW is a needful proscription respecting the Wilderness. The Congressional findings in the 1978 Act provide:

third necessitates some discussion.

The Court in *Kleppe, supra,* characterized the Property Clause as a general grant of power to Congress over federal property. The Court stated that the specific language of article IV, §3, cl. 2, however, "gives no indication of the kind of 'authority' the Clause gives Congress over its property." 426 U.S. at 538.

Mr. Justice Marshall, speaking for a unanimous Court, reasoned that the scope of Congress' authority under the Property Clause is broad enough to permit federal regulation of private land at least where such regulation is for the protection of federal property. The Court stated that, "the power granted by the Property Clause is broad enough to reach beyond territorial limits." 426 U.S. at 538.

The Congress finds that it is necessary and desirable to provide for the protection, enhancement, and preservation of the natural values of the lakes, waterways, and associated forested area known (before the date of enactment of this Act) as the Boundary Waters Canoe Area, and for the orderly management of public use and enjoyment of that area as wilderness, and of certain contiguous lands and waters, while at the same time protecting the special qualities of the area as a natural forest-lakeland wilderness ecosystem of major esthetic, cultural, scientific, recreational and educational value to the Nation.

§1 BWCAW Act, Publ. L. No. 95-495, 92 Stat. 1649 (1978). This section represents Congress' determination that the proscriptions in the Act are "needful" rules, and that such regulations are designed to promote the purposes of the BWCAW Act. This Court defers to the judgment of Congress in this regard. *See Kleppe v. New Mexico,* 426 U.S. 529, 536 (1976); *United States v. Brown,* 552 F.2d 817, 822 (8th Cir. 1977), *cert. denied,* 431 U.S. 949 (1978). *Accord Izaak Walton League v. St. Clair,* 353 F.Supp. 698, 707-10 (D. Minn. 1973).

There have been several judicial determinations in the District of Minnesota upholding the regulation of different motorized uses in the BWCAW as necessary to effect the purpose of having a canoe area Wilderness. *See United States v. Peterson,* Doc. No. 5-78-0036M at pp. 9-11 (D. Minn. July 24, 1978) (McNulty, J.); *United States v. Maki,* Doc. Nos. 5-78-2M through 5-78-16M at pp. 4-7 (D. Minn., April 12, 1978) (McNulty, J.); *United States v. Marleau,* Doc. Nos. 5-77-3 through 5-77-12 at p. 8 (D. Minn., May 25, 1977) (McNulty, J.); *Minnesota Federation of Ski Touring Clubs v. Knebel,* Doc. No. Civil 4-76-169 at p. 10 (D. Minn., Jan. 18, 1977) (Alsop, J.); *United States v. Perko,* 108 F.Supp. 315, 317, 322-23 (D. Minn. 1952) (Nordbye, J.), aff'd 204 F.2d 446 (8th Cir. 1953).

See also Camfield v. United States, 167 U.S. 518, 525-26 (1897). *Cf. Hunt v. United States*, 278 U.S. 96, 100 (1928). The basic rule articulated by the Court in *Kleppe, supra*, is that Congress may regulate the use of non-federal land at least where such regulations are needful rules, respecting or protecting the public lands.[24]

The Court of Appeals for the Eighth Circuit has ruled on the specific question raised

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in this case. In *United States v. Brown*, 552 F.2d 817 (8th Cir. 1977), the Court of Appeals characterized the issue before it as "whether the Property Clause empowers the United States to enact regulatory legislation protecting federal lands from interference occurring on non-federal public lands, or, in this instance, waters." *Id.* at 822. The Eighth Circuit, relying primarily upon *Kleppe, supra*, ruled that the Property Clause is broad enough to permit federal regulation of non-federal public lands. *Id.*

Brown, supra, concerned an individual who was served with a citation for violating National Park Service regulations prohibiting possession of firearms and hunting wildlife in the Voyageurs National Park. Mr. Brown was cited for duckhunting while on waters owned by the State of Minnesota. This Court determined, at Mr. Brown's District Court appeal, that the defendant's actions constituted a significant interference with the prescribed uses of the public park, justifying the issuance of the citation. *United States v. Brown*, 431 F.Supp. 56, 63 (D. Minn. 1976). In that case, this Court ruled that the Property Clause

[24]In *Kleppe v. New Mexico*, 426 U.S. 529 (1976), the Court ruled that a federal act designed to protect horses and burros on public lands was constitutionally permissible under the Property Clause. *Id.* at 546.

empowered Congress to regulate over non-federal lands and waters so long as the legislation respects and protects public property. *Id.* at 62-63. The Court of Appeals affirmed that determination. *United States v. Brown,* 552 F.2d 817, 821-23 (8th Cir. 1977), *cert. denied,* 431 U.S. 949 (1978).

The issue presently before the Court boils down to determining what type of activity constitutes such an interference with federal property that it may properly be regulated. In this Court's *Brown* decision, it was stated:

> The Court, however, specifically declines to decide whether all the regulations of the Park Service which are or may be applicable to water areas not owned by the United States, but which are within the park's boundaries may be enforced under the authority of the Property Clause. *It is only where, as here, certain commercial or recreational activities significantly interfere with the use of the park and the purpose for which it was established that this Court would agree the United States has authority to regulate the activities on territory over which it has neither acquired ownership nor a grant of jurisdiction from the State.*

431 F.Supp. at 63 (emphasis added).

In the instant case, it is clear beyond doubt that Congress has determined the BWCAW is to be retained as a natural forest-lakeland canoe area wilderness, and that motorized uses within the Wilderness conflict with this purpose. Accordingly this Court finds that the use of motorboats and snowmobiles where otherwise not specifically authorized by the Act significantly interferes with the use of the BWCAW and the purpose for which the

Wilderness Area was created. It seems apparent to this Court that in determining what type of activity Congress deems inconsistent with the purpose of the Wilderness, it may paint with a broad brush. The only limitation upon Congress' determination in this area is that its finding be reasonable. In the case at bar, this Court finds that Congress' determination is rational and that the Act's restrictions are reasonably related to the purpose of the legislation, and not arbitrary.

This Court concludes that Congress is constitutionally empowered to regulate the use of non-federal lands and waters under the Property Clause of the United States Constitution and that the present Act is a permissible use of that Congressional power.

Since the Court determines that the power to regulate all lands and waters within the BWCAW is granted to the Congress, it follows that such power is not reserved to the States. Accordingly, the State of Minnesota's Tenth Amendment claim must fail, and as a matter of law, judgment must be entered in favor of the defendants and the defendant-intervenors. Based upon this determination, the Court deems it unnecessary to determine whether the Commerce or Treaty Making Powers similarly empower Congress.

(b) *The Water Jurisdiction Issue*

The State of Minnesota has argued that if this Court were to find the present

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piece of legislation a constitutionally permissible Congressional enactment under the Property Clause, then the

state would be entirely written out of the regulatory picture. The state's position is regretably black and white; it assumes that only one governmental entity can exercise jurisdiction over the surface waters within the BWCAW. This assumption is erroneous and conflicts with the plain language of the statute.

Section 15 of the BWCAW Act provides:

> Sec. 15. The Secretary is authorized to promulgate and enforce regulations that limit or prohibit the use of motorized equipment on or relating to waters located within the wilderness in accordance with the provisions of this Act: *Provided,* That nothing in this Act shall be construed as affecting the jurisdiction or responsibilities of the State with respect to such waters except to the extent that the exercise of such jurisdiction is less stringent than the Secretary's regulations promulgated pursuant to this section: *Provided further,* That any regulations adopted pursuant to this Act shall be complementary to, and not in derogation of regulations issued by the United States Coast Guard.
>
> The Secretary is authorized to enter into cooperative agreements with the State of Minnesota with respect to enforcement of Federal and State regulations affecting the wilderness and the mining protection area.

§15 BWCAW Act, Pub. L. No. 95-495, 92 Stat. 1649, 1657-58 (1978).

Section 16(a) of the Act provides:

Cooperation With State

> Sec. 16. (a) The Secretary shall cooperate with the State of Minnesota and any political subdivision thereof in the administration of the mining protection area and in the administration and protection of lands within or adjacent to the mining protection area owned or controlled by the State or any political subdivision thereof. Nothing in this title shall deprive the State of Minnesota or any political subdivision thereof of its right to exercise civil and criminal jurisdiction within the wilderness and the mining protection area and impose land use controls and environmental health standards on non-Federal areas within the wilderness and the mining protection area, or of its right to tax persons, corporations, franchises, or other non-Federal property, including mineral or other interests, in or on lands or waters within the wilderness and the mining protection area.

§16(a) BWCAW Act, Pub. L. No. 95-495, 92 Stat. 1649, 1658 (1978).

It seems clear from reading these sections that Congress sought, through the BWCAW Act, to construct a management scheme whereby both the federal government and the State of Minnesota would take active and complementary roles in the administration of the Wilderness.

The new Act does not divest the state of jurisdiction over the surface waters within the Wilderness. The only extent to which the state's jurisdiction is restricted by the new Act concerns the situation where Minnesota would wish to open more surface water for motorized use—this the state cannot do. The state, however, could issue

regulations restricting motorized uses which are more stringent than the federal restrictions; under the Act, the state could close all the surface waters of the Wilderness to motorboats and snowmobiles.

The state has argued that the issue of using motorboats and snowmobiles is really only a minor concern. The real issue, as it appears to the state, with regard to the jurisdiction of Minnesota over its waters, is its ability to control the use of the water in the BWCAW for every purpose, particularly to restrict any mining operations within the Wilderness.

This Court reads §§15 and 16 as stating that Minnesota retains its jurisdiction to control mining in the Wilderness. Nothing in the Act divests the state of its authority to regulate mining in the BWCAW. In fact, since the Act specifically states that Minnesota retains jurisdiction over its waters and may issue even more stringent

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regulations, it could thereby restrict the use of the waters in such a fashion as would close the area to mining altogether. The state has expressed misgivings that at some future date it might be read out of the regulatory picture with regard to mining. Even though the federal authorities might wish to allow mining and other development repugnant to the state's notion as to the desirability of the area's being retained as a Wilderness, any court in considering such a construction would have to recognize that the history of the Act and its support by Congressional Representatives from Minnesota nowhere contains any intimation that Minnesota ceded its sovereignty to the federal government. The Act contemplates that both the

state and federal governments will retain equal control in the Wilderness.

The Act demands a dual sovereign administration so that any federal inclination to disturb the Wilderness would necessarily be reviewed by state authorities as well. The Act contemplates that both federal and state governmental authorities will combine their efforts so that compromise as well as dual sovereign concern will produce effective protection of the Wilderness.

The state contends that in making land exchanges with the federal government and in making all of the necessary accommodations to enable the federal government to establish and maintain a Wilderness Area, they did not, by so doing, contemplate or agree to allow the federal government to pre-empt state control for other purposes. I hold that they have not so ceded jurisdiction; Minnesota can prohibit mining. To hold otherwise would be a total perversion of the entire Congressional scheme.

In conclusion, the Court finds there are presently no material facts in dispute, and as a matter of law the plaintiffs' claims must fall; accordingly, summary judgment must be entered in favor of the defendant and defendant-intervenors.

Accordingly, it is Ordered that plaintiff and plaintiff-intervenors' motions for summary judgment are denied; defendant and defendant-intervenors' motions for summary judgment are granted.

THE THIRD CASE

C. *National Ass'n of Property Owners v. Bergland*, Civ. 5-80-25

Plaintiffs in the instant case allege that §102(2) (C) of the National Environmental Policy Act (NEPA) requires

the Secretary of Agriculture to prepare an Environmental Impact Statement (EIS) on the implementation and administration of the BWCAW Act. Plaintiffs' prayer requests that this Court enjoin the federal defendants from implemplementing the provisions of the new Act until an EIS is prepared.

Defendants and defendant-intervenors have moved for summary judgment pursuant to Fed. R.Civ.P. 56 and dismissal pursuant to Fed.R.Civ.P. 12(b) (6) and 12(b) (1). Plaintiffs have also moved for summary judgment pursuant to Rule 56. After careful review of the entire file and all moving memoranda, the Court determines that plaintiffs' complaint fails to state a claim for relief; defendant-intervenors' motion to dismiss is granted. Accordingly, the remaining motions for summary judgment are denied.

1. *Discussion*

Section 102(2) (C) of NEPA, 42 U.S.C. §4332(2) (C) (1976) requires, in part, that an EIS be prepared for "major Federal actions significantly affecting the quality of the human environment."[25] 42 U.S.C.

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[25]Section 102(2)(C) specifically provides in relevant part:

The Congress authorizes and directs that, to the fullest extent possible: . . . (2) all agencies of the Federal Government shall—
(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—
(i) the environmental impact of the proposed action,
(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
(iii) alternatives to the proposed action,
(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

42 U.S.C. §4332(2)(C) (1976).

§4332(2) (C) (1976). After reviewing the entire file and counsel's memoranda, the Court determines that NEPA does not require the reparation of an EIS prior to the implementation of the new Act. The Court rests this determination on two separate and distinct rationales. First, the Secretary's function as the Administrator of the Act and the actions which his Department engages in through the implementation of the new Act are not "major federal actions" within the meaning of §102(2 (C). Second, even if it were the case that the Department of Agriculture's enforcement of the Act constituted a "major federal action," to require the Department to prepare an EIS prior to enforcing this more recent mandate of Congress would place NEPA and the BWCAW Act in direct conflict with one another. Such conflict must be resolved in favor of the BWCAW Act under the *Flint Ridge* Doctrine. *Flint Ridge Development Co. v. Scenic Rivers Ass'n*, 426 U.S. 776 (1976).

a. *Major Federal Action*

The Court of Appeals for the Eighth Circuit has very recently shed some light on the meaning of the term "major federal action" as it is used in §102(2) (C) of NEPA. In *South Dakota v. Andrus*, 614 F.2d 1190 (8th Cir. 1980) the Eighth Circuit indicated that an appropriate analysis in the instant case demands essentially two inquiries: (1) whether the Department of Agriculture's enforcement of the BWCAW Act constitutes an "action" within the meaning of §102(2)(C), and (2) whether such action is "major"; that is, whether it significantly affects the quality of

the human environment. *South Dakota v. Andrus,* 614 F.2d 1190, 1193 (8th Cir. 1980).

Turning to the first inquiry, this Court notes the general rule that ministerial acts are not within the ambit of NEPA's EIS requirement. In this regard the Eighth Circuit, in *South Dakota v. Andrus, supra,* stated: "Reasoning that the primary purpose of the impact statement is to aid agency decision making, courts have indicated that nondiscretionary acts should be exempt from the requirement." 614 F.2d at 1193 (citing *N.A.A.C.P. v. Medical Center Inc.,* 584 F.2d 619, 634 (2d Cir. 1978); *Monroe County Conserv. Council, Inc. v. Volpe,* 472 F.2d 693, 697 (2d Cir. 1972); *Environmental Defense Fund Inc. v. Corps of Engineers,* 470 F.2d 289, 294 (8th Cir. 1972), *cert. denied,* 412 U.S. 931 (1973); *Calvert Cliffs' Coordinating Committee, Inc. v. A.E.C.,* 449 F.2d 1109, 1114 (D.C. Cir. 1971)). The BWCAW act directs the Secretary of Agriculture to administer the Wilderness in accordance with the provisions in the Act. Congress, itself, has determined how the Wilderness shall be administered. The Act mandates which lakes are motorized and which lakes are not. Likewise, the Act itself mandates the manner in which certain resorts and surrounding lakeshore property is to be purchased by the government. In this regard the Secretary has no discretion. It is the Congress which has spoken; the Secretary must abide by the sovereign's language. It seems obvious to this Court that no EIS is required on the Congressional mandate to alter the recreation management scheme in the Wilderness area. *See Pacific Legal Foundation v. Quarles,* 440 F.Supp.

316, 326 (C.D. Cal. 1977).[26] The Act gives the Secretary no discretion to alter the Congressional

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proscriptions mandated by the Act.[27] The Eighth Circuit, noting that the Supreme Court has yet to rule on whether non-discretionary actions fall within the scope of NEPA's EIS requirement, has determined that pending final word from the Court, in this Circuit, it is doubtful that a non-discretionary act is an "action" under §102(2) (C). *Andrus, supra,* 614 F.2d at 1193-94 and n. 4.

Turning to the second inquiry, the Court of Appeals for this Circuit has defined the word "major" in terms of whether the alleged federal action is one which "significantly affects the quality of the human environment." *An-*

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[26]In *Pacific Legal Foundation v. Quarles,* 440 F.Supp. 316 (C.D. Cal. 1977), Judge Pregerson, in determining whether a Congressional mandate, which required secondary sewage treatment for all sewage plants, necessitated the preparation of an EIS, reasoned:

> The court concludes that by Section 301 of the Water Act Congress mandated the application of secondary treatment to sewage plant discharge within the territorial seas or through outfalls. Under the regulations defining secondary treatment, 40 C.F.R. Part 133, sludge is prohibited. Obviously, no EIS is required on the Congressional mandate to require secondary treatment for all sewage plants.

Id. at 326.

[27]Section 4(g) and (h) of the Act give the Secretary some discretion to terminate motorized uses on certain portages and set forth additional standards and criteria for further defining the type of motorized crafts that may be used in the Wilderness. It may well be the case that if and when the Secretary determines to exercise its discretion pursuant to thse provisions, and when the Secretary proposes to implement actions not specifically mandated by Congress in the Act, an environmental assessment or an EIS may then properly be required. The instant case, however, does not present this issue; therefore the Court declines to rule on the question.

Likewise, §18 of the Act authorizes the Secretary to intensify the program of dispersed outdoor recreation development on the Superior National Forest outside the boundary of the Wilderness. The Court is not presently faced with the question of whether proposals pursuant to this section require the preparation of an EIS, accordingly, upon this issue the Court declines to issue a final ruling.

drus, supra, 614 F.2d at 1193 and 1194. *Andrus, supra,* concerned whether the United States Department of Interior, prior to its issuance of a mineral patent to Pittsburgh Pacific Co., was required to prepare an EIS. Along with determining that the federal defendant merely engaged in a ministerial act, thus excepting its conduct from the scope of NEPA, the Circuit Court further reasoned that the issuance of the mineral patent did not enable the mining company to act so as to significantly affect the environment. *Id.* at 1194. The Court in *Andrus, supra,* thus reasoned that so long as the federal action does not enable any person to significantly affect the environment, such action is not considered "major," as the term is used in §102(2) (C).

In the case at bar, the Secretary's implementation of the Act enables no person to significantly affect the Wilderness. In fact, plaintiffs major complaint is simply that Congress' mandate to the Secretary will effectively close portions of the Wilderness to many, thus not enabling these persons to motorboat and snowmobile throughout the Wilderness. In essence, plaintiffs' claim is that the Department of Agriculture must prepare an EIS in order to leave nature alone. The Court is not moved by this argument. This Court finds that the Secretary's action in implementing the present Act will enable no one to significantly affect the environment. Accordingly, the Secretary's administrative efforts in implementing the Act are not "major" federal actions within the meaning of §102 (2) (C).

Alternatively, the Court notes that the change in the recreation management of the Wilderness Area as mandated in the new Act is not the type of activity which is

considered major federal action within the meaning of §102(2) (C). In *Lake Berryessa Tenants' Council v. United States*, 588 F.2d 267 (9th Cir. 1978), the Ninth Circuit ruled that a change in recreation management from state to federal authorities, and policies which required the removal of privately-owned floating structures, and restricted the use of houseboats, were not major federal actions within the meaning of §102(2) (C). *Id.* at 271.

The instant case concerns the administration of a new Wilderness management scheme for the BWCAW; the Act which mandates this change represents Congress' determination that this lakeland canoe area should be protected from certain human uses which could have the effect of destroying its wilderness character. An EIS is generally required where an agency plans to act, or authorizes another to act, in such a manner so as to adversely affect the environment. Here the Congress, through

[499 F.Supp. 1266]

legislating the BWCAW Act, and the Secretary whose duty it is to enforce it, are attempting to protect the Wilderness area from man—thus ensuring that no one will adversely impact the wilderness environment. Accordingly to require the Secretary to prepare an EIS before he may carry out Congress' direction to protect that area seems at a minimum unnecessary, and at the maximum inconsistent.[28]

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[28]Plaintiffs allege that the new Wilderness restrictions will adversely impact the socioeconomic status of that part of Minnesota. This allegation, however, will not sustain plaintiffs' action. The Eighth Circuit Court of Appeals has recently ruled that adverse socioeconomic effects, alone, are not enough to trigger the EIS requirement of NEPA. *Como-Falcon Community Coalition, Inc. v. United States Dep't of Labor*, 609 F.2d 342, 345 (8th Cir. 1979). The fundamental question which must

b. *The Flint Ridge Doctrine*

In *Flint Ridge Development Co. v. Scenic Rivers Ass'n*, 426 U.S. 776 (1976), the Supreme Court, noting

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be affirmatively satisfied before the EIS provision applies it: will the agency action adversely impact the natural-physical environment? Judge Lay, speaking for the appeals court in *Como-Falcon, supra,* reasoned:

> When action will have a primary impact on the natural environment, secondary socio-economic effects may also be considered. *See, e.g., Hanly v. Mitchell,* 460 F.2d 640 (2d Cir.), *cert. denied,* 409 U.S. 990, 93 S. Ct. 313, 34 L.Ed.2d 256 (1972); Council on Environmental Quality Guidelines, 40 C.F.R. §1500.8(a)(3)(ii) (1975). *But when the threshold requirement of a primary impact on the physical environment is missing, socio-economic effects are insufficient to trigger an agency's obligation to prepare an EIS.*

609 F.2d at 3450 (emphasis in the original) (*quoting Image of Greater San Antonio, Texas v. Brown,* 570 F.2d 517, 522 (5th Cir. 1978) (citations omitted). *See also Breckinridge v. Rumsfeld,* 537 F.2d 864, 865 (6th Cir. 1976), *cert. denied,* 429 U.S. 1061 (1977); *National Ass'n of Govt. Employees v. Rumsfeld,* 418 F.Supp. 1302, 1305 (E.D. Pa. 1976).

It is instructive to note that Judge Lay, in affirming the District Court's determination that the physical environment was not primarily impacted, quoted this language from District Judge MacLaughlin's Order:

> [L]ocation of the Job Corps center on the Bethel site will not substantially alter the character of the neighborhood. Bethel oCllege and Seminary occupied the site in 1914, thus predating many of the neighboring residences. No new construction has occurred on the campus since 1957. The Department of Labor does not propose construction of additional buildings or major alteration of the face of the acmpus. *It does intend to refurbish the existing buildings and to budget more funds for grounds maintenance than did Bethel College.* The Court, therefore, cannot overturn the Department's judgment that use of the site as a Job Corps will substantially alter the character of the neighborhood.

609 F.2d at 346. (Quoting *Como-Falcon Coalition, Inc. v. United States Dept. of Labor,* 465 F.Supp. 850, 866 (D. Minn. 1978)) (emphasis added) (citations omitted).

It seems that both the District Court, as well as the Court of Appeals assumed that any construction which would occasion a more fully groomed campus is not the type of activity necessitating the preparation of an EIS. In such a case, the action would not adversely impact the character of the neighborhood.

Earlier in NEPA's history, courts were faced with the puzzling question of whether agencies whose functions it is to protect the

that §102's requirements are neither "accidental nor hyperbolic," nevertheless ruled that "where a clear and un-

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environment must be bound by §102's EIS requirement. NEPA's purpose is to protect the environment; its EIS requirement represents one of its protective devices. NEPA, however, is not the only statute enacted by Congress which seeks to protect the environment. Herein lies the dilemma: if to enforce the NEPA "statement" requirement would have the practical effect of frustrating Congress' intent to protect the environment through another environmentally directed statute, then must NEPA apply ?

Judge Leventhal, addressing this question in *Portland Cement Ass'n v. Ruckelhaus*, 486 F.2d 375 (D.C. Cir. 1973), reasoned that NEPA is only a first step toward environmental protection. That court stated:

> The goal of protecting the environment requires more than NEPA provides, i.e., specific assignment of duties to protection agencies, in certain areas identified by Congress as requiring extra protection . . . . An impact statement requirement presents the danger that opponents of environmental protection would use the issue of compliance with any impact statement requirment as a tactic of litigation and delay.

Id. at 383-84. Judge Leventhal noted in *Portland Cement, suprta,* Senator Muskie's admonition from the Senate floor debate on the applicability of NEPA "statements" to the EPA, pursuant to the Federal Water Pollution Control Act A3mendments of 1972. Senator Muskie warned:

> If the general procedural or substantive reforms achieved in NEPA . . . were permitted to override, supersede, broaden, or affect in any way the more specific environmental mandate of the FWPCA, the administration of the Act would be seriously impeded and the intent of Congress in passing it frustrated.

Id. at 384 n. 37 (quoting 118 Cong. Rec. 16878 (daily ed., Oct. 4, 1972)).

The District of Columbia Circuit in *Portland Cement, supra,*

The District of Columbia Circuit in *Portland Cement, supr* however, declined to formulate a broad exemption from NEPA for all agencies acting, in one form or another, to protect the environment. Instead, the court construed a narrow exception from NEPA applicable to determinations under §111 of the Clean Air Act. That court determined, ultimately, that §111 required the functional equivalent to a NEPA statement. *See also Environmental Defense Fund, Inc. v. EPA*, 489 F.2d 1247, 1257 (D.C. Cir. 1973); *International Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 650 n. 130 (D.C. Cir. 1973); *Anaconda Co. v. Ruckelshaus*, 482 F.2d 1301, 1305-06 (10th Cir. 1973); *Buckeye Power, Inc. v. EPA*, 481 F.2d 162, 174 (6th Cir. 1973); *Appalachian Power Co. v. EPA*, 477 F.2d 495, 508 (4th iCr. 1973).

This Court is mindful of the fact that *Portland Cement, supra,* and the cases cited thereafter are all factually dissimilar to the instant case. The cases cited *supra* all involve the EPA's administration of the Clean Air Act or the FWPCA Amendments of 1972. The Court highlights these earlier cases only in an effort to note that

avoidable conflict in statutory authority exists, NEPA must give way." *Id.* at 787-88. The Court reasoned that if requiring the Secretary of the Housing and Urban Development Authority to prepare an EIS would create an irreconcilable and fundamental conflict with the Secretary's duties under the Interstate Land Sales Full Disclosure Act, 15 U.S.C. §1701 *et seq.* (1976), then NEPA must yield and no EIS is required.

In *Flint Ridge, supra,* environmental protection groups petitioned the Department of HUD to prepare an EIS before the Department permitted a private real estate developer's statement of record as to a proposed subdivision project adjacent to a state-designated "scenic" river in Oklahoma to become effective. The Disclosure Act required private real estate developers to file statements of record as to new subdivisions and furnish property reports to prospective purchasers. These statements of record were to become automatically effective within thirty (30) days of their being filed with the Department, unless found to be incomplete or inaccurate.

The Court ruled that the Disclosure Act mandated the effective date of accurate and complete statements of record as the thirtieth day after filing. It noted that an EIS could not possibly be complete within the thirty (30) day period, and accordingly found a conflict. The Court stated:

NEPA is not the only road to environmental protection, and that where Congress has constructed other thoroughfares toward such protection NEPA should not be raised as a detour toward such a goal.

It should also be noted that §20 of the BWCAW Act directs the Secretary to submit a comprehensive management plan to the Congress no later than October 1, 1981, setting forth the specific management procedures to implement the Act's objectives. This provision represents Congress' express direction as to what it wants studied, and the manner of the study; in this way, §20 highlights NEPA's inapplicability to the BWCAW Act.

> The Secretary cannot comply with the statutory duty to allow statements of record to go into effect within 30 days of filing, absent inaccurate or incomplete disclosure, and simultaneously prepare impact statements on proposed developments. In these circumstances, we find that NEPA's impact statement requirement is inapplicable.

426 U.S. at 791. *Flint Ridge, supra,* instructs that when it is not possible to follow the EIS requirements without conflicting with another specific statutory mandate, then NEPA must yield. *See Alaska v. Carter,* 462 F.Supp. 1155, 1161 (D. Alaska 1978). *Accord Gulf Oil Corp. v. Simon,* 502 F.2d 1154, 1156-57 (Temp. Emer. Ct. App. 1974); *Dry Color Manufacturers' Ass'n v. Department of Labor,* 486 F.2d 98, 107-08 (3d Cir. 1973); *Atlanta Gas. Light Co. v. Federal Power Comm'n,* 476 F.2d 142, 150 (5th Cir. 1973).

The instant case presents this conflict; the BWCAW Act mandates that the Secretary of Agriculture administer the Boundary Waters Wilderness in accordance with the provisions in the Act. Section 4(c) directs that "[*e*]*ffective* on January 1, 1979" the motorized use restrictions shall be ad-

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ministered by the Secretary. §4(c) BWCAW Act, Publ. L. No. 95-495, 92 Stat. 1650 (emphasis added). Likewise the other provisions of the Act are mandated to take effect at the time of the statute's enactment. If this Court were to legislate into the BWCAW Act the additional requirement that the motorized use proscriptions could not be enforced until an EIS was filed or, for that matter, any

other of the mandatory provisions in the Act, then it would create a clear conflict in statutory authority. *See Alaska v. Carter*, 462 F.Supp. 1155, 1161 (D. Alaska 1978). Accordingly, NEPA does not compel the Secretary to prepare an EIS in the instant case. Plaintiffs' complaint therefore fails to state a claim upon which relief may be granted; defendant-intervenors' motion to dismiss is granted.

ORDER

Based upon the Findings of Fact and Conclusions of Law set out above it is ORDERED:

1. In Civil 5-79-95: plaintiffs' motion for summary judgment is denied; defendants' and defendant-intervenors' motion for summary judgment is granted.

2. In Civil 5-79-178: plaintiff and plaintiff-intervenors' motion for summary judgment is denied; defendant and defendant-intervenors' motion for summary judgment is granted.

3. In Civil 5-80-25: defendant-intervenors' motion to dismiss is granted; the remaining motions for summary judgment are denied.

Dated: July 24, 1980.

/s/ MILES W. LORD
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FIFTH DIVISION

Civil 5-79-95

National Association of Property Owners; National Park Inholders Association; Ely-Winton Boundary Waters Conservation Alliance; Local 4757 United Steel Workers of America; Lac La Croix Indian Band; Greater Virginia Area Chamber of Commerce; Crane Lake Commercial Club; Minnesota Arrowhead Association; Ely Chamber of Commerce; Carol M. Fisher; Border Lakes Association; Crane Lake Voyageur Snowmobile Club, Inc.; Crane Lake Sportsmen's Club; Ash River Namakan Lake Association; Charlotte Ekroot, d/b/a Windigo Lodge; Robert J. Handberg, d/b/a Campbell's Cabins and Trading Post;

Plaintiffs,

and

State of Minnesota,

Plaintiff-Intervenor,

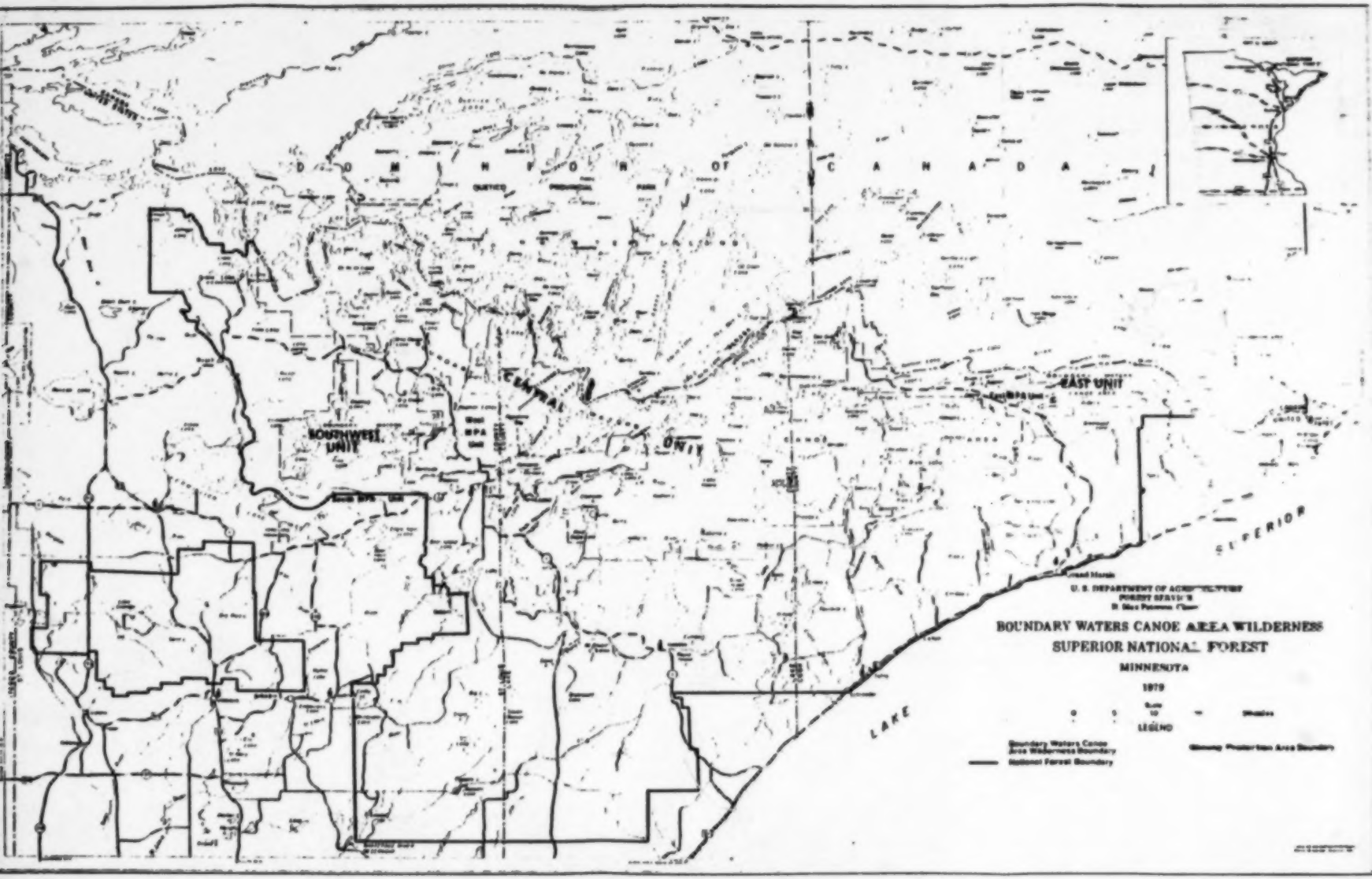
vs.

United States of America; Bob Bergland, Secretary of Agriculture, individually and in his official capacity;

Defendants,

and

Sierra Club; Friends of the Boundary Waters Wilderness; League of Women Voters of Minnesota; Izaak Walton League of America, Inc.; Minnesota Rovers; Wilder-


D O M I N I O N O F C A N A D A
SOUTHWEST UNIT
CENTRAL UNIT
EAST UNIT
LAKE SUPERIOR
U.S. DEPARTMENT OF AGRICULTURE
FOREST SERVICE
BOUNDARY WATERS CANOE AREA WILDERNESS
SUPERIOR NATIONAL FOREST
MINNESOTA
1979
LEGEND

ness Inquiry II; Minnesota Environmental Control Citizens Association; Minneapolis Chapter, National Audubon Society; St. Paul Chapter, National Audubon Society; Duluth Chapter, National Audubon Society; Minnesota Ornithologists' Union; The Wilderness Society;

Defendant-Intervenors.

Civil 5-80-25

National Associiation of Property Owners; Ely-Winton Boundary Waters Conservation Alliance; Range Actioneers, Inc.; Crane Lake Sportsmen's Club; City of Winton;

Plaintiffs,

v.

Bob Bergland, individually and in his official capacity as Secretary of Agriculture; R. Max Peterson, individually and in his official capacity as Chief of the United States Forest Service;

Defendants,

and

Sierra Club; Friends of the Boundary Waters Wilderness; League of Women Voters of Minnesota; Izaak Walton League of America, Inc.; Minnesota Rovers; Wilderness Inquiry II; Minnesota Environmental Control Citizens Association; Minneapolis Chapter, National Audubon Society; St. Paul Chapter, National Audubon Society; Duluth Chapter, National Audubon Society; Minnesota Ornithologists' Union; The Wilderness Society;

Defendant-Intervenors.

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lis, MN 55402; and Stephen J. Snyder and Richard N. Flint, 300 Roanoke Building, Minneapolis, MN 55402; and David P. Pearson, 2380 American National Bank Building, St. Paul, MN 55101; and Marcia Gelpe, 2125 Girard Avenue South, Minneapolis, MN 55405; attorneys for Sierra Club.

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Wayne H. Olson, Special Counsel, 315 Peavey Building, Minneapolis, MN 55402; and Warren Spannaus, Attorney General, by Philip J. Olfelt, Assistant Attorney General, 375 Centennial Office Building, St. Paul, MN 55155; attorneys for State of Minnesota by Joseph Alexander.

Johnson, Essling, Williams, Essling & Daly, Ltd., by William W. Essling and David Essling, 828 Minnesota Building, St. Paul, MN 55101, attorneys for Carl Brown, d/b/a Walleye Bait & Tackle Co.; Viking Cruises, Inc.; Concerned Citizens of Northeastern Minnesota; Boundary Waters Landowners Association; Koochiching County; City of South International Falls; Village of Ranier; International Falls Chamber of Commerce; and City of International Falls.

O'Connor & Hannan, by Frank J. Walz and Thomas R. Sheran, 38th Floor IDS Tower, Minneapolis, MN 55402, attorneys for United Snowmobilers Association, Inc.

AMENDED ORDER

By date of August 4, 1980, the Lac La Croix Indian Band and Campbell's Cabins and Trading Post, Ltd., moved the Court to alter its judgments of dismissal of July 25, 1980, in the above civil actions, pursuant to Rule 59(e), Fed. R. Civ. P.[1] The relevant facts with regard to the Indian Band's and Campbell's motion follow.[2]

These two entities claim that the 1978 BWCAW Act,[3] to the extent that it prohibits use of motor powered boats on international boundary waters within the BWCAW, conflicts with and affects Article I of the Root-Bryce Treaty of 1909.

The Indian Band is a community of 240 Canadian Indians located in a roadless area on the North (Canadian) shore of Lac La Croix at the Namakan River on the Neguaguon Lake Indian Reserve. The band claims its livelihood is derived from the commerce of guiding fish-

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[1]On Augus 15, 1980, the moving parties withdrew their request insofar as it applied to the second of the three related cases, *State of Minnesota, et al. and Carl Brown, et al. v. Robert Bergland, et al. and Sierra Club, et al.*, Civil Action No. 5-79-178. Accordingly, the Court's order directly affects only the two remaining cases.

[2]The Lac La Croix Indian Band is a party to the first of the three related civil actions, *National Association of Property Owners, et al and State of Minnesota v. United States, et al. and Sierra Club, et al.*, Civil Action No. 5-79-95. Campbell's Cabins and Trading Post, Ltd., is an entity that is not formally a party to any of the three civil actions, but Robert J. Handberg, d/b/a Campbell's Cabins and Trading Post, is a party to the first civil action.

[3]The Boundary Waters Canoe Area Wilderness Act of 1978, Public Law 95-495, 92 Stat. 1649 (October 21, 1978).

ing parties on Lac La Croix in the summer and trapping in the winter.

Campbell's is a Canadian corporation which owns and operates a fishing resort and trading post on the north (Canadian) shore of Lac La Croix three miles west of the Neguaguon Indian Reserve. Indians from the Band work at Campbell's as guides.

The Root-Bryce Treaty between the United States and Great Britain, Treaties in Force, U. S. and Canada, p. 26, provides in Article I as follows:

> "The High Contracting Parties agree that the navigation of all navigable boundary waters shall forever continue free and open for the purposes of commerce to the inhabitants and to the ships, vessels, and boats of both countries equally, subject, however, to any laws and regulations of either country, within its own territory, not inconsistent with such privilege of free navigation and applying equally and without discrimination to the inhabitants,

[499 F.Supp. 1269]

> ships, vessels and boats of both countries."

Section 4 of the 1978 BWCAW Act specifically prohibits the use of motorized vehicles on international boundary waters within the BWCAW, with specific exceptions. The international boundary waters in the BWCAW include the following lakes and waterways. Little Vermillion Lake, the Loon River, Loon Lake, Lac La Croix, the Bottle River, Bottle Lake, Iron Lake, Crooked Lake, the Basswood River, Basswood Lake, Sucker Lake, Birch Lake, Carp Lake, Seed Lake, Knife Lake, Cypress Lake, Swamp Lake, Saganaga Lake, Gunflint Lake, North

Lake, South Lake, Rose Lake, Mountain Lake, Moose Lake, North Fowl Lake and South Fowl Lake. Some motorized use is allowed on a portion of Lac La Croix, Moose Lake, Sucker Lake, a portion of Basswood Lake, a portion of Saganaga, North Fowl, South Fowl, Basswood River, Carp Lake, and Knife Lake. (The size of motors is restricted, however, on these waters except a portion of Lac La Croix.)

Section 17 of the 1978 BWCAW Act provides in part that: "Nothing in this Act shall affect the provisions of any Treaty now applicable to lands and waters which are included in the . . . wilderness."

I.

This is not the first time that a party to this action has urged the Court to invalidate the Act because of an alleged conflict with a preexisting treaty. The initial complaint in this matter raised challenges to the Act under the Webster-Ashburton Treaty of 1842, another treaty that concerns the regulation of boundary waters between the United States and Canada.

The Court's Memorandum Opinion dated July 24, 1980, addressed the plaintiffs' Webster-Ashburton claims and determined that they did not affect the Act's validity. To achieve that result, the Court followed the rule set out in *The Chinese Exclusion Case*, 130 U.S. 581 (1889); as to the domestic law of the United States—that is, the law to be applied by this Court—where a later piece of legislation conflicts with an earlier enacted treaty, the statute controls. *See* Memorandum Opinion, at page 41.

The Indian Band and Campbell's in their memoran-

dum recognize the validity of this well-established legal principle. In order to avoid its effect, however, they belatedly argue Section 17 of the 1978 BWCAW Act, which states that "nothing in this act shall affect the provisions of any treaty now applicable to lands and waters which are included in the mining protection area and the wilderness." The argument continues that in order to read the Root-Bryce Treaty in consonance with Section 17, the conclusion has to be drawn that the clear, specific motorized route proscriptions in the statute cannot and do not mean what they say.

For the reasons outlined below, the Root-Bryce contentions fail to state a claim upon which the plaintiffs can obtain relief. The validity of the BWCAW Act, first passed upon in the Memorandum Opinion, is once again affirmed, and this latest challenge to its legality is dismissed.

II.

A. The success of plaintiffs' claims under statutory Section 17 depends upon a preliminary finding that the Root-Bryce Treaty is impermissibly affected by Section 4 of the Act. If no conflict exists between the Treaty and Section 4, Section 17's admonition against affecting treaty provisions is not even called into play.

Article I of the Root-Bryce Treaty not only commits the contracting parties to keep navigable boundary waters free and open to the citizens of both countries equally but also reserves each nation's rights to regulate the boundary waters within its own territory. Pursuant to that reserved regulatory power, the province of Ontario, Canada, has barred motorboats and snowmobiles in the Quetico Pro-

vincial Park—adjacent to the BWCAW along an extensive portion of the international boundary—with an exemption for several lakes where motors can be used by the Lac La Croix Band. Memorandum Opinion, p. 13. When it approved the 1978 BWCAW Act, Congress was well aware of the Canadian regulations

[499 F.Supp. 1270]

and thus had no reason to think that Section 4 violated any treaty with Canada; Canada was already doing something very similar to what the United States proposed.

Both contracting parties to the Treaty, then, have recognized by their regulatory actions that the Root-Bryce Treaty does not prohibit motorized use restrictions such as those at issue; however, the plaintiffs urge the Court to find that the Root-Bryce Treaty creates an absolute right to use motorboats in boundary waters, a right with which the reserved regulatory powers cannot interfere. This the Court cannot do, for it would require ignoring the plain wording of the Treaty as well as its clear intent.

Specifically, Article I of Root-Bryce provides that "navigation of all navigable boundary waters shall forever continue free and open for the purposes of commerce to the inhabitants and to the ships, vessels, and boats of both countries *equally*." (Emphasis added.) The essence of the entitlement conferred by the Treaty is not the creation of a right of access to navigable boundary waters, but the preservation of an equal right of passage along the border to the citizens of both nations. The Treaty, in short, outlaws discrimination by one country against the citizens of the other.[4]

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[4]The special privilege afforded the Indian Band in Quetico, therefore, gives one pause for thought.

In that respect, the Root-Bryce provision is similar to the Webster-Ashburton Treaty, and the advice from the State Department to Congress concerning the meaning of language in the Webster-Ashburton Treaty applies with equal force to the Root-Bryce Treaty. As Robert J. McCloskey, an assistant secretary of state, explained, a clause preserving the free and open status of the international waters was intended not to guarantee the use of mechanized transport therein, but to prevent discrimination:

> At the time, the Webster-Ashburton treaty was signed, the waterways and portages of this area were an important route to the West. We believe that the intent of the "free and open" provision for these waters was to ensure that this important route remained open, on an equal basis, to the nations of both countries. It would not be correct, however, to interpret "free and open" so broadly as to prohibit either United States or Canadian authorities from imposing any limitation upon the manner in which such waterways and portages may be used. In agreeing to free and open use of these waterways and portages, neither party intended to relinquish its sovereign role of imposing statutory limitations on behavior which would not be in the best interest of the respective country.

Letter from Robert J. McCloskey to Honorable James L. Oberstar, Exhibit 7B to Affidavit of Dr. Miron L. Heinselman, *National Ass'n of Property Owners v. United States*, (D. Minn., July 28, 1979).

The language reserving the power to regulate within

Article I of Root-Bryce also comports with McCloskey's interpretation of the Treaty's essential purpose as being the prohibition of discriminatory regulation. The Treaty states that the right of equal access is "subject to any laws and regulations of either country, within its own territory, not inconsistent with such privilege of free navigation and applying equally and without discrimination to the inhabitants, ships, vessels and boats of both countries." The motorized use restrictions in force on both sides of the border fall within that reserved regulatory power, for they are nondiscriminatory and therefore do not interfere with the "privilege of free navigation" as defined in Article I of the Root-Bryce Treaty. In fact, under the 1978 BWCAW Act, the traditional form of travel in the canoe country (that is, by canoe) is allowed to citizens of both countries on an equal basis. Emphasizing the Act's restrictions and their validity should not obscure the fact that the boundary waters continue to remain free and open to nonmotorized vehicles, be they commercial or recreational, Canadian or American.

The essential command of the Root-Bryce Treaty of 1909 is that citizens of both the United States and Canada be treated on a

[499 F.Supp. 1271]

par within the boundary waters. The 1978 BWCAW Act adheres to that longstanding and equitable notion, even as it permits some uses and restricts others; that even-handedness is the most important indication that no treaty has been violated.

Furthermore, the fact that Congress enacted both Section 4 and Section 17 strongly suggests that Congress in-

terprets the Root-Bryce Treaty of 1909 as permitting nondiscriminatory motorboat restrictions on the international boundary waters. It would have made no sense for Congress to expend the massive amount of time and effort that went into the specific restrictions and compromises of Section 4 if the general language of Section 17 voided large parts of those restrictions from the start. Given the Congressional awareness of the Canadian regulations and the careful detail of Section 4, it is unreasonable to conclude that Congress intended Section 17, through the Root-Bryce Treaty, to strike down the thrust of the BWCAW Act. The most reasonable inference is that Congress felt the Root-Bryce Treaty, like Webster-Ashburton, did not conflict with Section 4 in the first place.

The Root-Bryce Treaty and Sections 4 and 17 of the 1978 BWCAW Act can all be reconciled on one basis: in light of the emphasis in the Root-Bryce Treaty on equality of treatment, the intent of Congress in passing the 1978 Act and the similar motorized use restrictions in Canada, the unequivocal motorized use restrictions in Section 4 of the Act do not violate any treaty; Section 17 (in concert with Root-Bryce) does not inhibit the effectiveness of the remainder of the Act, and plaintiffs' motion must be denied.

B. Although the Court, in denying plaintiffs' motion, expressly holds that no conflict exists between the 1978 BWCAW Act and the Root-Bryce Treaty, even if an inconsistency were found, the result in this case would not change. The regulations of Section 4 would withstand the present challenge in any event.

The plaintiffs contend that Section 17 of the Act requires the invalidation of Section 4 of the same statute be-

cause of an alleged conflict with Root-Bryce. To reach that conclusion, they contend that the universally accepted principle that later enacted legislation controls an earlier treaty is abrogated by Section 17's general command that nothing in the Act shall affect a valid treaty.

Plaintiffs made the same argument with respect to the Webster-Ashburton Treaty, but this Court held that the later legislation controls nonetheless. Memorandum Opinion, pp. 40-41. The result is the same for the Root-Bryce Treaty of 1909: even if Section 4 of the Act were in conflict with the Root-Bryce Treaty of 1909, Section 4 would control. Section 17 does not change that outcome. Congress specifically named international boundary waters in Section 4 of the Act and specifically placed restrictions on such waters. The general provision of Section 17 does not nullify the specific restrictions in Section 4 of the Act; that would be reading into Section 17 an effect not intended by its authors. Nothing in the legislative history brought to the Court's attention suggests Congress had it in mind to use Section 17 to undo the comprehensive regulatory scheme simultaneously established in Section 4.

The very absurdity of invalidating the specific, detailed restrictions of Section 4 based upon the broad terms of Section 17 reinforces the conclusion that the 1978 Act stands as written. It also indicates that Congress. when enacting Section 17, was of the opinion that the restrictions in Section 4 did not violate any treaty in force, and it thereby shows the difficulty of assuming a conflict between the Act and the Treaty even for the purposes of argument. Difficult tasks, however, cannot always be avoided, and therefore the Court expressly finds that the

traditional principle articulated in *The Chinese Exclusion Case, supra,* would govern this matter even if Section 4 conflicted with the Root-Bryce Treaty. Section 17 does not block the application of that well-established legal rule to the 1978 BWCAW Act, and the restrictions of Section 4 would take precedence over the Root-Bryce Treaty in the event of an inconsistency.

C. In sum, the Court bases its decision to uphold the regulations in the 1978

[499 F.Supp. 1272]

BWCAW Act on alternative grounds: first, it finds that the motorized use restrictions in Section 4 do not violate any treaty, including Root-Bryce; second, even if Section 4 conflicted with Article I of Root-Bryce, the Court holds that the later enacted statute would control.

ORDER

Accordingly, IT IS HEREBY ORDERED, that the motion of the Lac La Croix Indian Band and Campbell's Cabins and Trading Post, Ltd., to alter judgment is in all things denied.

Dated: December 15, 1980.

/s/ MILES W. LORD
U. S. District Judge

Opposition

1

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81-1198

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

STATE OF MINNESOTA, et al.
Petitioner,

vs.

JOHN R. BLOCK, Individually and as Secretary of Agriculture of the United States, et al.,
Respondents.

BRIEF of RESPONDENT NATIONAL ASSOCIATION OF PROPERTY OWNERS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Does the property clause of the United States Constitution authorize the federal government to regulate state and privately owned lands and waters adjacent to federal lands in order to further the federal purposes for the federal lands?

PARTIES TO THE PROCEEDING

These parties are all set forth in the Petition of Petitioner, State of Minnesota, page ii.

TABLE OF AUTHORITIES

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Respondent,

PETITION OF RESPONDENT NATIONAL ASSOCIATION OF PROPERTY OWNERS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

STATEMENT OF CASE

Five separate cases were initiated in the United States District Court for the District of Minnesota and filed for appeal in the Eighth Circuit Court of Appeals, numbers 80-1769; 80-1784; 80-1815; 80-1860; and 80-1872. All cases were consolidated for trial at the District Court level and also at the Court of Appeals.

For purposes of brevity, the petitioner adopts the Statement of the Case as prepared by the petitioner, the State of Minnesota.

REASONS FOR GRANTING THE WRIT

The Eighth Circuit Court of Appeals has attempted to remove all limits upon the

federal power imposed through the "Property clause" (Article IV, Subdivision 3) of the Constitution of the United States. Although this power has traditionally limited Congress to impose restrictions upon non-federally owned land only to prevent threats to federal lands which are real, grave, direct, and imminent, the Eighth Circuit has attempted to justify federal control over state and private lands and waters--despite an absence of consent by the State--through a novel theory merging interstate commerce law theories into their interpretation of the property clause. The Constitution has never before received this interpretation,- which if allowed to stand--implies that state sovereignty over its own lands and waters does not exist, and that the power of the federal government is without limits.

Cases cited by the Eighth Circuit Court of Appeals to support their decision do not support the Court's reasoning and are inappropriately applied.

If the Eighth Circuit's decision is allowed to stand, the Tenth Amendment of the Constitution of the United States is effectively rendered inoperative, and state sovereignty over its own lands and waters does not exist. The Circuit Court attempted to justify its decision in part through the fact that the United States owns close to 90 per cent of the lands surrounding the waters at issue. This is irrelevant. Size of ownership should not give rise to additional rights to control lands and waters of others.

IMPROPER INFERENCES DRAWN

The Court of Appeals decision either misreads or is in conflict with several cases:

Kleppe v. New Mexico, 426 U.S. 529 (1976) holds that a state may not impose its rules and regulations on federal land; it does not hold that federal regulations may be imposed on state or private lands adjoining federal lands.

In Kansas V. Colorado, 206 U.S. 46 (1907), the Court found that ownership of the beds of waters adjacent to federal lands vested control of the state's waters with the state.

A more recent case, Montana v. United States, 101 S. Ct. 1245 (1981), held that ownership of the riverbed within a reservation gave the state the power to regulate recreational hunting and fishing. The Court of Appeals ignored this case in its opinion.

Camfield v. United States, 167 U.S. 518 (1897), held that owner of private lands could not endanger federal property through the destructive use of fire.

United States v. Alford, 274 U.S. 264 (1927), held that private landowners could not use their property to deprive federal government the access to and use of its land.

It has also been held in McKelvey v. United States, 260 U.S. 353 (1927) that actions on private lands which endangered the life, safety and free access of individuals to public lands could be regulated. The Court did not hold that--absence that threat--the federal government could regulate lands and waters not its own, simply to further what it felt was a valid federal purpose.

CONCLUSION

Petitioners have not challenged the right of the federal government to regulate their own lands, as Congress may direct. However, the issue here is whether Congress may determine the use (or nonuse) of state and private lands and waters outside the BWCAW, absent a real, grave, and imminent peril to the federal lands and waters within, and absent the

state's permission. If we carry reasoning of the Eighth Circuit to its extreme, Congress could legally designate the specific use of every acre of land in the United States, so long as it was for the stated goal of furthering federal purposes. Due process is notably absent from such a scheme.

The Eighth Circuit has attempted to extend the scope of the property clause far beyond its previous parameters, and in conflict with existing case law. The ruling bears serious, far-reaching ramifications for states not even parties to this lawsuit.

For the above reasons, National Association of Property Owners respectfully requests that the Petition for Writ of Certiorari be granted to resolve the conflicts raised by the decision issued by the Eighth Circuit Court of Appeals.

Respectfully Submitted,

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Opposition

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No. 81-1198

IN THE

Supreme Court of the United States

October Term, 1981

STATE OF MINNESOTA,

Petitioners

v.

JOHN R. BLOCK, ET AL.,

and

SIERRA CLUB, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE SIERRA CLUB, ET AL., IN OPPOSITION

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QUESTION PRESENTED

Whether the Congress has the power pursuant to the property or commerce clauses to regulate motorboats and snowmobiles on navigable waters, the beds of which are state owned, that are within a federal wilderness where the federal government owns 90 percent of the land within the wilderness and the regulation concededly furthers the federal purpose to which the wilderness is dedicated.

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IN THE

Supreme Court of the United States

October Term, 1981

No. 81-1198

STATE OF MINNESOTA,

Petitioners

v.

JOHN R. BLOCK, ET AL.,

and

SIERRA CLUB, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE SIERRA CLUB, ET AL., IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals is reported at 660 F.2d 1240. The opinion of the district court is reported at 499 F.Supp. 1223.

JURISDICTION

The judgment of the court of appeals was entered on September 30, 1981. The petition for a writ of certiorari was filed on December 23, 1981. Petitioners invoke the jurisdiction of this Court under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions involved include:

The supremacy clause, U.S. Const., art. VI, cl. 2: "This constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; . . . ."

The property clause, U.S. Const., art. IV, §3, cl. 2: "The Congress shall have the power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; . . . ."

The commerce clause, U.S. Const., art. I, §8, cl. 3: "The Congress shall have power . . . To regulate commerce with foreign nations, and among the several states, ..."

The tenth amendment, U.S. Const. amend. X: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

The statute involved is the Boundary Waters Canoe Area Wilderness Act, Pub. L. No. 95-495, 92 Stat. 1649 (Oct. 21, 1978) (1978 BWCAW Act), and is reproduced in the petition at A-1 to A-24.

STATEMENT[1]

Introduction

The 1978 BWCAW Act regulates the use of motorboats and snowmobiles in the Boundary Waters Canoe Area Wilderness (the Boundary Waters) in northeastern Minnesota by prohibiting their use on certain lakes and rivers and by limiting motor size and size of vehicles on others.

A description of the Boundary Waters

The Boundary Waters is the only lakeland wilderness canoe area in the nation. It rests along the Minnesota-Canada border for 110 miles, encompassing about 1,080,300 acres. East of the Rockies, it is the largest unit of the National Wilderness Preservation System; it is the second largest unit in the continental United States. The Boundary Waters is made up of over 1,000 lakes, joined together by streams and portages. This area was the means of travel for the early French and English fur traders who navigated water routes pioneered by the Sioux and Ojibwa. This wilderness is home to hundreds of species of unusual birds, plants, and animals, and contains 540,000 acres of virgin forests. To the north of the Boundary Waters lies Canada's Quetico Provincial Park, a similar wilderness enclave of lakes and forests, where, as in the Boundary Waters, motor are generally banned. The Boundary Waters is used by people from throughout the United States, Canada and elsewhere.

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[1] The facts that follow are summarized from the opinions of the courts below. 660 F.2d 1245-1247; 499 F.Supp. 1228-1230; 1253-1259.

Federal ownership of the Boundary Waters

The United States is the predominant landholder within the Boundary Waters. Of the 1,080,300 acres of land within the wilderness boundaries designated by the 1978 BWCAW Act, the United States owns 792,000 acres; Minnesota and various counties own 121,000 acres of land surface. There are 160,000 acres of water area that are primarily navigable waters of the United States, many of which are international boundary waters. Minnesota owns the beds of those waters.

In its petition, Minnesota described its property within the Boundary Waters as "a 280,000 acre . . . wilderness area" (Petition at 1) and described its ownership interest as being in "the same vicinity" as certain federal lands (Petition at i). These descriptions are misleading. The land owned by Minnesota and local governments is scattered in small pockets throughout the many acres of federal land.[2] While the state may own the beds of many of the lakes and rivers, most of those water bodies are navigable waters of the United States, with the vast majority international boundary waters. Further, the one million acre Boundary Waters wilderness itself is included within and surrounded by the three million acre Superior National Forest, again a predominantly federal enclave, to the south, and to the north the international boundary and Canada's Quetico Provincial Park. Minnesota is not an owner of a large, discrete wilderness area in the "vicinity" of the Boundary Waters; the State is an incidental inholder.

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[2] A forest service map is attached hereto. Federal land is in green and private, state, and county land is in white.

Longstanding federal regulation of the Boundary Waters

Federal ownership and regulation of the Boundary Waters and its lakes and rivers have been longstanding. The lands within the Superior National Forest enclave, which includes the Boundary Waters, were originally public domain lands that were withdrawn from disposal by the federal government between 1902 and 1908. The Superior National Forest was established by presidential order in 1909, and what is now the Boundary Waters was established as a federal roadless area in 1926 for the purpose of preserving the area as a canoe wilderness.

In response to threats to dam parts of the Boundary Waters in the 1920's and 1930's, Congress enacted one of the early environmental laws—the Shipstead-Nolan Act—in 1930. That act prohibits alterations in the water levels within the Superior National Forest. *See United States v. New Mexico*, 438 U.S. 696, 710 (1978).[3] Thus, there has been prior, specific federal regulation of the waters at issue in this case,[4] indeed action taken to preserve the nature of the area as a canoe wilderness. (H.R. Rep. No. 1945, 71st Cong., 2d Sess. 1, 6-7 (1930)).

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[3] The Shipstead-Nolan Act is codified at 16 U.S.C. §§577 *et seq.* (1976). It operates in conjunction with the 1899 Rivers and Harbors Act, 33 U.S.C. §§401, 404, 407, and 565 (1976) to prohibit any alteration in water levels within the general Boundary Waters area.

[4] The Shipstead-Nolan Act is in addition to federal regulation of those waters pursuant to such laws as the 1899 Rivers and Harbors Act, 33 U.S.C. §§401 *et seq.* (1976); the Root Bryce Treaty (or Boundary Waters Treaty) of 1909, 36 Stat. 2449; the Motorboat Act of 1940, 46 U.S.C. §§526 *et seq.* (1976); the Federal Boat and Safety Act of 1971, 46 U.S.C. §§526, 1451-1459 (1976); and the 1972 Clean Water Act, 33 U.S.C. §§1251 *et seq.* (1976 and Supp. III 1978).

Other federal regulation followed, including the creation in 1934 of the Quetico-Superior Committee by President Franklin Roosevelt to work with various federal agencies and Canada on the administration of the Boundary Waters, a federal ban by President Truman on airplane over-flights in 1949, and official designation of the area as the Boundary Waters Canoe Area by the Department of Agriculture in 1958.

The Boundary Waters, along with other areas, was designated a wilderness area in 1964 when Congress enacted the 1964 Wilderness Act. The act generally banned the use of motor boats and snowmobiles within wilderness areas. 16 U.S.C. §§1133(c), 1131(a) (1976). At the urging of northern Minnesotans, the Wilderness Act, however, included a special Boundary Waters provision allowing the continued use of motorboats on routes where such use had already been established. 16 U.S.C. §1133(d)(5) (1976). This provision, and other special treatment of the Boundary Waters concerning logging, mining, and snowmobiling in that act, and its administration by the U.S. Forest Service, generated much controversy.

The 1978 BWCAW Act

The 1978 BWCAW Act was passed to resolve longstanding political differences over use of the Boundary Waters, in large part because of the special treatment in the 1964 Wilderness Act. The 1978 BWCAW Act regulates, among other things, motorboat and snowmobile use, logging and mining in the Boundary Waters.

The congressional findings for the 1978 BWCAW Act demonstrate that Congress deems a unified system of regulation of all lands and waters within the Boundary Waters

necessary to accomplish the wilderness purposes of the 1978 Act:

> Section 1. The Congress finds that it is necessary and desirable to provide for the protection, enhancement, and preservation of the natural values of the lakes, waterways, and associated forested areas known (before the date of enactment of this Act) as the Boundary Waters Canoe Area, and for the orderly management of public use and enjoyment of that area as wilderness, and of certain contiguous lands and waters, while at the same time protecting the special qualities of the area as a natural forest-lakeland wilderness ecosystem of major esthetic, cultural, scientific, recreational and educational value to the Nation.

The 1978 BWCAW Act expressly prohibits motorboats within the Boundary Waters on all but certain specified lakes. (Section 4(c)) It expressly prohibits snowmobiles on all but certain specified routes. (Section 4(e)) Moreover, the 1978 BWCAW Act specifically directs the Secretary of Agriculture to implement a quota system for motorboats where they are allowed. (Section 4(f))[5]

Congress has determined that the federally owned lands, and the associated navigable waters of the United States, are to be preserved as a "wilderness." The very nature of a wilder-

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[5] Minnesota argues that the 1978 BWCAW Act, when properly construed, does not apply to the navigable waters at issue. Petition at 3 n.3. The court of appeals rejected that argument, as it was, and is, without merit. 660 F.2d at 1248 n.15. The court of appeals noted that the entire focus of the debate before Congress concerned which lakes were to be motor-free and properly found that that argument contradicts the plain language as well as the purpose and legislative history of the 1978 BWCAW Act.

ness consists of, among other things, quietude.[6] Motorboats and snowmobiles unquestionably destroy quiet. An opportunity for solitude is also an aspect of wilderness.[7] Motor noise spread throughout an otherwise pristine primitive lake robs the wilderness visitor of any opportunity for solitude. A requirement that travel be by primitive means, that is, by foot or paddle, is also an aspect of wilderness.[8] Motorboats, snowmobiles, and similar motor powered vehicles, represent industrial society's victory over nature. Motors are the antithesis of wilderness.

The 1978 BWCAW Act is one of a few recent determinations reflecting the fact that wilderness is an endangered species. The forces of technology, from land development to mechanized travel, and attendant noise, have left few areas in their untrammeled status of two hundred years ago. The 1978 BWCAW Act preserves one such area.

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[6] "Quietude" is specifically recognized as a natural resource in the Minnesota Environmental Rights Law, Minn. Stat. §116B.02 subd. 4 (1980). Minn. Pub. Interest Research Group v. White Bear Rod and Gun Club, 257 N.W.2d 762 (Minn. 1977) (enjoining trap and skeet shooting, in part because of impact on quietude). Noise is recognized as a pollutant in, among other places, the Noise Pollution and Abatement Act of 1970, 42 U.S.C. §7641 (1976); and Minn. Stat. §116.07 (1980). Petitioner State of Minnesota regulates snowmobile noise by regulation. 6 MCAR §1.0057E.

[7] In the 1964 Wilderness Act, a wilderness is defined as an area that "has outstanding opportunities for solitude." 16 U.S.C. §1131(c) (1976).

[8] Congress's policy statement for the 1975 Wilderness Act follows: "[I]n order to preserve such areas as an enduring resource of wilderness which shall be managed to promote and perpetuate the wilderness character of the land and its specific values of solitude, physical and mental challenge, scientific study, inspiration, and primitive recreation for the benefit of all the American people of present and future generations." Act of Jan. 3, 1975, Pub.L. No. 93-622, 88 Stat. 2096 §2(b).

The decisions below

The district court held that the motorized use restrictions were a proper exercise of Congress' property clause powers in that the use of motorboats and snowmobiles, where not authorized by the 1978 BWCAW Act, "significantly interferes with the use of the BWCAW and the purpose for which this Wilderness Area was created." 499 F.Supp. at 1261.

The court of appeals agreed with the district court, stating that the hearings and other evidence presented to the Congress amply supported Congress' finding that the "use of motorboats and snowmobiles must be limited in order to preserve the area as a wilderness."[9] 660 F.2d at 1251. The court properly observed that the United States owns almost 90 percent of the land surrounding the waters at issue and held that the motorized use restrictions were a proper exercise of Congress' power to pass needful rules respecting public lands. *Id.*[10]

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[9] In oral argument before the court of appeals, counsel for Minnesota conceded the general proposition that motorized use restrictions are related to wilderness preservation.

[10] Thus, both the district court and the court of appeals saw past Minnesota's disingenuous argument that "nothing in the legislative history indicates any purpose to protect federal property or the environment." Petition at 2. As the court of appeals found, the legislative history of the 1978 BWCAW Act demonstrates beyond question that the motorized use restrictions were necessary in many respects to protect the federal area as a wilderness. 660 F.2d at 1250-1252.

ARGUMENT

This is a case where Congress exercised its property clause powers over extensive federal landholdings and associated navigable waters within a federal enclave. Minnesota admits in its Question Presented For Review that the regulation at issue furthers the federal purposes to which federal lands are committed.[11] Petition at i. This case, accordingly, presents no difficult questions; if ever there were a valid exercise of the property clause, this most certainly is it.

I. THE PETITIONER GREATLY EXAGGERATES THE NATIONAL IMPORTANCE OF THIS CASE.

The situation in the Boundary Waters is factually simple in that the United States is the predominant landholder, with Minnesota and various counties merely incidental inholders.

The situation, however, is factually unique in that the extensive federal holdings and the incidental state lands are intertwined; the waters at issue are inextricably intertwined with the federal lands and are navigable waters of the United States. The waters are primarily international boundary waters. The Boundary Waters is the nation's only lakeland canoe wilderness; the Boundary Waters has historically been managed in tandem with a foreign wilderness area—Ontario's Quetico Provincial Park. The factual circumstances do not make this wilderness area typical of other areas around the country. It is uniquely federal and, further, uniquely international. Accordingly, any decision in this case would have application only to this unusual wilderness area.

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[11] "Does the property clause of the United States Constitution authorize the federal government to regulate state-owned lands and waters *to further the federal purposes for federal lands* in the same vicinity?" (emphasis added) Petition at i.

II. THE DECISION IN THE COURT OF APPEALS IS CLEARLY CORRECT.

The decision below rests upon earlier cases by this Court.[12] The first is *Camfield v. United States*, 167 U.S. 518 (1897). There, the defendants owned the odd-numbered sections of land within a large area, while the even-numbered sections remained in federal ownership, resulting in a checkerboard of private and federal tracts. By constructing fences only on the peripheral private tracts, the defendants effectively enclosed the area, which included 20,000 acres in the public domain. The United States brought suit to compel removal of the fences under the Unlawful Inclosures Act, which prohibited such fencing schemes. The defendants' constitutional challenge to the statute's application to fences built on private property was rejected by this Court. Relying on the property clause, the Court stated:

> The general Government doubtless has a power over its own property analogous to the police power of the several states, and the extent to which it may go in the exercise of such power is measured by the exigencies of the par-

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[12] We note in passing that every lower court decision addressing the specific issue in this case has been in agreement with the court of appeals. The power of the federal government to regulate state owned or controlled property within federally owned parks and wilderness areas has been affirmed in United States v. Lindsey, 595 F.2d 5 (9th Cir. 1979); in United States v. Brown, 552 F.2d 817 (8th Cir.), *cert. denied*, 431 U.S. 949 (1977), and by two federal magistrates. See 660 F.2d at 1249 n.19. All relied on Kleppe v. New Mexico, 426 U.S. 529 (1976). There is no confusion in the lower courts on this issue.

The State of Minnesota omits mention of the fact that this Court recently denied certiorari in United States v. Brown, *supra*, a case raising issues identical to those in this case. Minnesota participated in that case.

> ticular case. If it be found to be necessary for the protection of the public, or of intending settlers, to forbid all enclosures of public lands, the government may do so, though the alternate sections of private lands are thereby rendered less available for pasturage.

167 U.S. at 525. The Court in *Camfield* affirmed the use of the property clause to regulate fences erected on property adjacent to federal land.

Importantly, the statute construed in *Camfield* had nothing to do with the *protection* of federal property from physical harm. Instead, its purpose was to ensure access to the public lands for pasturage and ultimately for settlement. The statute effectuated the congressional policy that the public lands should be settled as soon as possible.

A more recent precedent is *Kleppe v. New Mexico*, 426 U.S. 529 (1976), *reh. denied*, 429 U.S. 873 (1976), which held that a statute protecting wild horses and burros, allegedly owned by the State of New Mexico,[13] was valid under the property clause. This Court's opinion evidenced a broad view of the property clause power. The Court upheld the congressional judgment that the statute was a "needful" regulation "respecting" the federal property. "In our view, the 'complete power' that Congress has over public lands necessarily includes the power to regulate and protect the wildlife living there." 426 U.S. at 538.

Significantly, this Court went on to state that "the power granted by the Property Clause is broad enough to reach beyond territorial limits." 426 U.S. at 538. Also significant were this Court's declarations that Congress' discretion in

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[13] See State of New Mexico v. Morton, 406 F.Supp. 1237, 1239 (D. N.M. 1975), *reversed by* Kleppe v. New Mexico, *supra*.

exercising aspects of the property clause power was "without limitations," 426 U.S. at 539, and that Congress' judgment of what are "needful" rules "respecting" federal property is entitled to deference, 426 U.S. at 541.

Interestingly, like New Mexico, Minnesota's essential contention in this case is that "[w]here the federal property itself is not endangered, the property clause powers do not extend beyond the federal property." *Compare* Petition at 15 *with* 426 U.S. at 537. This Court rejected this physical protection rationale in *Kleppe v. New Mexico*, finding protection was only one basis for extending property clause powers beyond the federal property line.[14]

Another important aspect of *Kleppe*, insofar as it applies to this case, was New Mexico's and the district court's contention that the federal government could not regulate "state-owned" wildlife. This Court held that the state's traditional power to regulate wildlife it "owned" had to yield to Congress' property clause power.

This Court considered the related question of federal power to appropriate water appurtenant to land directly under federal control in *Cappaert v. United States*, 426 U.S. 128 (1976). In that case, the Court held that the federal government could prevent private landowners from pumping water from underground pools under private land because such pumping decreased the level of an underground pool at Devil's Hole Monument. The purpose of the reservation of Devil's Hole Monument was to preserve the pool because of its scientific importance and because it contained a peculiar species of fish.

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[14] *See* McKelvey v. United States, 260 U.S. 353, 359 (1922) ("[Congress] may sanction some uses and prohibit others, and may forbid interference with such as are sanctioned."); Camfield, *supra*.

Id. at 141. The Court affirmed the district court's injunction prohibiting pumping as necessary to preserve the pool and implement the purposes of the reserved land even though the water pools from which the private parties were pumping were not within the federal enclave. *Id.*

While the issue is not identical to the one in this case, this Court's opinion is instructive:

> This Court has long held that when the Federal Government withdraws its lands from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation . . . . Reservation of water rights is empowered by the Commerce Clause, Art. I., §8 which permits federal regulation of navigable streams, and the Property Clause, Art. IV, §3, which permits federal regulation of federal lands. The doctrine applies to Indian reservations and other federal enclaves, encompassing water rights in navigable and nonnavigable streams.

Id. at 138. *Cappaert* was a case where the federal government regulated water that it did not own which was physically outside the federal enclave.

Generally, this Court has upheld federal laws prohibiting fires on property neighboring federal lands,[15] securing nonfederal access to federal lands to further the purpose to which those lands were dedicated,[16] requiring extermination of state-protected deer to prevent overbrowsing,[17] prohibiting

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[15] United States v. Alford, 274 U.S. 264, 267 (1927).
[16] Camfield v. United States, *supra*.
[17] Hunt v. United States, 278 U.S. 96, 100 (1928).

the extermination of state "owned" wild and free roaming horses and burros,[18] and regulating the pumping of pools distant from federal lands to preserve water levels and fish located at those lands.[19] The decision of the court of appeals in this case falls squarely within these precedents.

In this case, the Congress concluded after extensive investigation that the motorized-use restrictions were necessary to further the purpose to which extensive federal landholdings were dedicated. That determination, one committed to Congress in article IV, section 2, is entitled to deference by this Court.

III. THE PETITIONERS' CONTENTION THAT THE APPEALS' DECISION CONFLICTS WITH EARLIER DECISIONS OF THIS COURT IS INCORRECT.

The first case the petitioners rely on is *Kansas v. Colorado*, 206 U.S. 46 (1907). That case held only that the exercise of the federal government's property clause power must be related to federal property.

This same *Kansas v. Colorado* argument was made by the State of New Mexico in *Kleppe v. New Mexico, supra*. The New Mexico argument in that case was essentially that the wild horses and burros at issue were state owned and, accordingly, could not be regulated by the federal government. The argument was, of course, rejected. This Court found that *Kansas v. Colorado* requires only the obvious: Congress' exercise of property clause powers must be related to federal property. As the preservation of wild horses and burros furthered the purposes to which federal lands were dedicated, the Wild

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[18] Kleppe v. New Mexico, *supra*.

[19] Cappaert v. United States, *supra*.

Horses and Burros Act was constitutional. Similarly, in this case, Congress has found a need to regulate state inholdings in order to secure the purpose to which federal land is dedicated. See Petition at i.

The petitioners' reliance on *Montana v. United States*, 450 U.S. 544 (1981) is also misplaced. That case reaffirmed the principle that the State owns the beds of navigable waters. State ownership has never been at issue in this case. The issue has always been whether the federal government had the constitutional power to regulate certain navigable waters where such regulation is a needful prescription respecting federal lands. In this light, *Montana v. United States* is a case that has nothing whatsoever to do with the property clause or the tenth amendment, and, thus, has nothing to do with this case.

IV. PETITIONERS' TENTH AMENDMENT CLAIM WAS REJECTED BY THIS COURT IN *HODEL V. VIRGINIA SURFACE MINING.*

Minnesota relies on *National League of Cities v. Usery*, 426 U.S. 833 (1976). As the court of appeals recognized, however, Minnesota raises no serious questions under *Usery* as the challenged statute regulates private conduct and not integral operations of state government. Thus, the tenth amendment issues raised by petitioners are identical to those recently addressed, and rejected, by this Court in *Hodel v. Virginia Surface Mining & Reclamation Association, Inc.*, 452 U.S. ——, 101 S.Ct. 2352 (1981), and deserve no further review.

Since the federal regulation of motorboats and snowmobiles is a legitimate exercise of the property clause, and other constitutional grants of power,[20] the supremacy clause makes those regulations the law of the land.

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[20] As the property clause provided adequate authority for the regulation at issue, both the court of appeals and the district court saw no need to pass on the question of whether the regulation was proper under the federal government's commerce and treaty powers. Should this Court decide to review the case, those issues should be included within the scope of any review. See State v. Kuluvar, 266 Minn. 408, 410-411, 123 N.W.2d 669, 703-704 (1963) ("It has long been recognized that Congress can constitutionally exclude the state in regulating these boundary waters under the commerce clause and the treaty-making power.")

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Opposition

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No. 81-1198

In the Supreme Court of the United States

OCTOBER TERM, 1981

STATE OF MINNESOTA, PETITIONER

v.

JOHN R. BLOCK, SECRETARY OF AGRICULTURE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether Congress has authority under the Property Clause of the United States Constitution to regulate use of motorized vehicles on all lands and waters within the Boundary Waters Canoe Area Wilderness in northeastern Minnesota, including navigable waters within the wilderness area and lands owned by the State of Minnesota that are scattered throughout the predominantly federally-owned wilderness area.

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BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B-1 to B-40) is reported at 660 F.2d 1240. The opinion of the district court (Pet. App. B-41 to B-161) is reported at 499 F.Supp. 1223.

JURISDICTION

The judgment of the court of appeals was entered on September 30, 1981. The petition for a writ of certiorari was filed on December 23, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner State of Minnesota brought this action against the Secretary of Agriculture to chal-

lenge certain provisions of the Boundary Waters Canoe Area Wilderness Act of 1978, Pub. L. No. 95-495, 92 Stat. 1649 *et seq.* ("BWCAW Act"), that restrict use of motorized vehicles within the Boundary Waters Canoe Area Wilderness (BWCAW), a part of the Superior National Forest in northeastern Minnesota.

The BWCAW lies along 110 miles of the border with Canada and comprises nearly 1.1 million acres (Pet. App. B-6, B-48, B-110; 45 Fed. Reg. 23006 (1980). The area, which includes over a thousand lakes joined by streams and portages, is the nation's only lakeland canoe wilderness and is the most heavily used wilderness area in the National Wilderness Preservation System (Pet. App. B-7, B-48). The BWCAW is complemented on the Canadian side of the international border by the Quetico Provincial Park of Ontario, in which the use of motor-powered watercraft on lakes, rivers, and streams is prohibited, with one narrow exception affecting members of an Indian band (*id.* at B-7, B-8 n.6, B-123 to B-124).

Of the land areas within the BWCAW, the United States owns approximately 792,000 acres; the State and various counties own approximately 121,000 acres; and private parties own approximately 7,300 acres (Pet. App. B-110). An additional area of approximately 160,000 acres is water, much of which is navigable, and the beds of these navigable waters are owned by the State (*ibid.*). The lands owned by the State, counties, or private parties are scattered in relatively small parcels throughout the predominantly federally owned BWCAW.[1]

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[1] We are lodging with the Clerk of the Court a United States Forest Service map of the Superior National Forest, which was introduced in the district court as Defendant's Exh. 4. It indicates which lands within the BWCAW are federally owned.

2. Beginning early in this century, both the State and the federal government have sought, through various measures, to protect the boundary waters area (Pet. App. B-8). The Superior National Forest was established in 1909 by President Theodore Roosevelt, who issued a proclamation setting apart as a public reservation certain lands that had been withdrawn from disposal under the public land laws during the preceding seven years (*id.* at B-110 to B-111). More lands were added in later years by reservation or acquisition (*id.* at B-111 to B-112, B-114 to B-115).

In 1926, the Secretary of Agriculture, in furtherance of a primitive area policy, set aside, as wilderness recreation areas, not less than one thousand square miles of the Superior National Forest containing the best of the lakes and waterways (Pet. App. B-112). Four years later, in Section 3 of the Shipstead-Nolan Act, 16 U.S.C. 577b, Congress generally prohibited alterations of the natural water level of any lake or stream within or bordering upon the areas now within the BWCAW if flooding of federal lands would result and if Congress has not given express consent to the alteration in question. In 1949, President Truman issued Exec. Order No. 10092, 14 Fed. Reg. 7637 (1949), creating an airspace reservation below the altitude of 4,000 feet over three areas within Superior National Forest that had been designated as roadless areas during the preceding year—areas that included bodies of water and nonfederal lands. See *Perko* v. *United States*, 204 F.2d 446 (8th Cir. 1953).

Those roadless areas, subsequently designated the Boundary Waters Canoe Area, were included in a national system of wilderness areas established in

1964 by the Wilderness Act, 16 U.S.C. 1131 *et seq.* (Pet. App. B-115 to B-116). Among the restrictions imposed on wilderness areas by that statute were prohibitions on the "use of motor vehicles [and] motorized equipment or motorboats" or any other "form of mechanical transport" (with exceptions made for uses needed to meet "minimum requirements for the administration of the area[s]"). 16 U.S.C. 1133(c). An additional exception was made for the BWCA through a section providing that the Act would not preclude "the continuance within the area of any already established use of motorboats." 16 U.S.C. 1133(d)(5).

In the same year the Wilderness Act was passed, the Secretary of Agriculture appointed a committee, including a representative of the State (Chron. Exh. 2),[2] to make recommendations on management of the BWCA (Pet. App. B-116). In 1965, acting pursuant to some of the committee's recommendations, the Secretary adopted regulations restricting the use of motorboats in that area to locations designated by the Chief of the Forest Service (Pet. App. B-117; now codified at 36 C.F.R. 293.16).

The State of Minnesota had also, over the years, enacted legislation and regulations protecting the natural character of the boundary waters area—in many cases statutes and regulations paralleling or complementing federal enactments (Pet. App. A-40 to A-42, A-44 to A-47, B-112 to B-115). In 1970 it issued regulations aimed at maintaining the primitive character of the area, which restricted the use of motorboats to areas designated by the Chief of the

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[2] "Chron. Exh." refers to an exhibit introduced in the district court.

Forest Service in the federal regulations (Pet. App. A-47, A-53 to A-55).

Additional federal restrictions were placed on motorboat use in 1977 through an order issued pursuant to the Secretary of Agriculture's regulations; and a federal administrative ban on the use of snowmobiles was issued in 1976 (Pet. App. B-121).

3. In 1978, after extensive public hearings and considerable debate,[3] Congress enacted the Boundary Waters Canoe Area Wilderness Act (BWCAW Act) in recognition of the need, *inter alia*, to protect "the special qualities of the [boundary waters] area as a natural forest-lakeland wilderness ecosystem of major esthetic, cultural, scientific, recreational and educational value to the Nation." (Pub. L. No. 95-495, Section 1, 92 Stat. 1649; Pet. App. A-1).[4] Subsidiary purposes of the Act included the objective of providing "for the orderly and equitable transition from motorized recreational uses to nonmotorized recreational uses on" certain "lakes, streams, and portages" in the Canoe Area (Section 2(6), 92 Stat. 1649; Pet. App. A-2). Accordingly, the Act included provisions restricting, but not entirely eliminating, the use of motorized vehicles in the Canoe Area.

In Section 4(b) of the Act, Congress repealed the provision of the Wilderness Act which had permitted established uses of motorboats (92 Stat. 1650; Pet. App. A-3 to A-4); and in Section 4(c) it set out a

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[3] See Staff of the Subcomm. on National Parks and Insular Affairs of the House Comm. on Interior and Insular Affairs, 95th Cong., 2d Sess., *Legislative History of the Boundary Waters Canoe Area Wilderness (Public Law 95-495)* 1-3, 10-12, 42-45, 84, 109-142, 256-262, 298-307 (Comm. Print 1978).

[4] The text of the BWCAW Act is reprinted at Pet. App. A-1 to A-24.

general ban on the use of motorboats in the Canoe Area, with specified exceptions on designated lakes and rivers for boats with motors not exceeding certain horsepower limits (92 Stat. 1650-1651; Pet. App. A-4 to A-5). (Some of the exceptions are for an indefinite period and others for periods of five, fifteen, or twenty years.) Section 4(d) of the Act permits use of motorboats without horsepower limitation on several named lakes or rivers (92 Stat. 1651; Pet. App. A-5 to A-6). Section 4(f) directs the Secretary of Agriculture to implement entry point quotas for the use of motorboats on the lakes enumerated in Section 4(c) (92 Stat. 1651; Pet. App. A-6 to A-7). Section 4(e) generally prohibits the use of snowmobiles in the Canoe Area, but authorizes the Secretary to permit their use indefinitely in certain specified areas and for a period of five years in other areas (92 Stat. 1651; Pet. App. A-6). Section 4(i) prohibits all use of motorized vehicles in the area except as authorized by the Act or as required for emergencies "or for the administration of the wilderness area by Federal, State, and local governmental officials or their deputies * * *where the Secretary finds that such use is essential" (92 Stat. 1652; Pet. App. A-7 to A-8). Finally, in Section 15 Congress provided (92 Stat. 1657-1658; Pet. App. A-20):

> Sec. 15. The Secretary is authorized to promulgate and enforce regulations that limit or prohibit the use of motorized equipment on or relating to waters located within the wilderness in accordance with the provisions of this Act: *Provided*, That nothing in this Act shall be construed as affecting the jurisdiction or responsibilities of the State with respect to such waters except to the extent that the exercise of such jurisdiction is less stringent than the Secretary's regulations

> promulgated pursuant to this section. * * * The Secretary is authorized to enter into cooperative agreements with the State of Minnesota with respect to enforcement of Federal and State regulations affecting the wilderness and the mining protection area.

4. On December 27, 1979, petitioner filed suit against the Secretary of Agriculture in the United States District Court for the District of Minnesota, challenging the validity of Sections 4(c), 4(e), 4(f), 4(i), and 15 of the BWCAW Act (Pet. App. B-13, B-109). Numerous parties intervened, some as plaintiffs and some as defendants; and all parties moved for summary judgment on the basis of stipulated facts and documents (*id.* at B-1 to B-2, B-109).

Petitioner principally contended that Congress lacks affirmative authority under the Constitution to regulate uses of state-owned lands and waters adjoining federal lands, and that the restrictions of the BWCAW Act affecting the use of motorboats and snowmobiles on state-owned areas within the wilderness boundaries therefore constituted an infringement of petitioner's powers under the Tenth Amendment (Pet. App. B-126).[5] The district court rejected the argument, concluding (*id.* at B-127 to B-132) that the challenged provisions are a proper exercise of authority under the Property Clause, Article IV, Section

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[5] Petitioner also argued that, as a matter of statutory construction, the challenged provisions of the BWCAW Act do not apply to state-owned lands and waters (see Pet. 3 n.3). As petitioner notes, however (*ibid.*), the district court did not comment on that contention and the court of appeals rejected it summarily (Pet. App. B-13 to B-14 n.15). For the reasons stated by the court of appeals, among others, the contention is frivolous. Petitioner restates that argument (Pet. 3 n.3), but does not present it as a question for review (see Pet. i).

3, clause 2, *i.e.*, that they are "needful" regulations aimed at protecting the wilderness character of the predominantly federal lands within the BWCAW, and that the Tenth Amendment does not bar this exercise of congressional power.[6] Accordingly, the court entered judgment for the Secretary and the defendant-intervenors (Pet. App. B-136).

5. The court of appeals affirmed (Pet. App. B-1 to B-25, B-40). It held (*id.* at B-15 to B-17) that under *Camfield* v. *United States*, 167 U.S. 518 (1897), as explained in *Kleppe* v. *New Mexico*, 426 U.S. 529 (1976), Congress possesses power under the Property Clause to enact legislation affecting conduct on non-federal lands where regulation of that conduct is necessary to prevent interference with the purposes to which neighboring federal lands are dedicated. It found ample support in the testimony and other evidence considered by Congress for the congressional finding that the use of motorboats and snowmobiles within the boundaries of the BWCAW would threaten the wilderness character of the area (Pet. App. B-19 to B-20), and reasoned (*id.* at B-20 to B-21) that in

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[6] The district court did not reach alternative contentions of the Secretary and defendant-intervenors that the challenged provisions were also authorized by the Commerce Clause and the Treaty Clause of the Constitution (Pet. App. B-132). The defendant-intervenors raised both arguments, and the Secretary made the Commerce Clause argument, in the court of appeals. In view of the broad authority Congress enjoys under the Commerce Clause (see, *e.g.*, *United States* v. *Appalachian Power Co.*, 311 U.S. 377, 426 (1940)), regulation of modes of navigation on navigable waters in an area that attracts tourists from all over the nation because of its wilderness character should be sustainable under the clause. We do not discuss the question here because it was not reached by the court of appeals (*id.* at B-21 n.24).

view of the fact that the United States owned 90% of the land surrounding the waters to which the State claimed title, the restrictions constituted "needful regulations respecting public lands" (*id.* at B-21). The court also concluded (*id.* at B-21 to B-25) that under principles enunciated in *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), and *Hodel* v. *Virginia Surface Mining & Reclamation Association, Inc.*, No. 79-1538 (June 15, 1981), the motorized use restrictions do not infringe upon state powers preserved by the Tenth Amendment.

ARGUMENT

The decision of the court below is correct and does not, as petitioner contends, conflict with decisions of this Court. Petitioner properly does not assert any conflict among the circuits. Given the special historical and geographical relationship between the federal lands in the Boundary Waters Canoe Area Wilderness and the interspersed state-owned lands and waters in that area, the constitutional issue is, moreover, of limited significance. Review by this Court is, accordingly, not warranted.

1.a. The decision below represents a proper application of the principles declared in *Camfield* v. *United States*, 167 U.S. 518 (1897), which, as this Court noted in *Kleppe* v. *New Mexico*, 426 U.S. 529, 538 (1976), support the general proposition that "the power granted by the Property Clause is broad enough to reach beyond territorial limits." See Gaetke, *The Boundary Waters Canoe Area Wilderness Act of 1978: Regulating Nonfederal Property Under the Property Clause*, 60 Ore. L. Rev. 157, 175-182 (1981) (motorboat restrictions in BWCAW Act are constitutional under *Camfield*).

In *Camfield*, the Court considered the constitutionality of a federal law forbidding enclosures of public land and authorizing the abatement of such enclosing fences even where they were erected on nonfederal lands in odd-numbered sections surrounding federally-owned even-numbered sections. The Court found the authority for this law in the "general Government['s] * * * power over its own property analogous to the police power of the several States" and noted that "the extent to which it may go in the exercise of such power is measured by the exigencies of the particular case." 167 U.S. at 525. In *Camfield* the exigent circumstance was the need to keep the federal lands open to public entry and settlement, as Congress intended. Although invoking the law of nuisance (*id.* at 522-523, 528), the Court made it clear that it found the application of the enclosure law to fences on nonfederal lands justified by the right of the federal government to provide necessary "protection of the public, or of intending settlers." *Id.* at 525. See also *United States* v. *Alford*, 274 U.S. 264, 267 (1927) (Property Clause authorized law penalizing the careless setting of fires on nonfederal lands adjacent to federal lands, since such actions imperiled "the publicly owned forests").

Here, as in *Camfield*, the statute in question regulates uses of areas adjoining federal lands that interfere with the uses of those federal lands. As the court below noted (Pet. App. B-19 to B-20), testimony before Congress established that "the sight, smell, and sound of motorized vehicles seriously marred the wilderness experience of canoeists, hikers, and skiers and threatened to destroy the integrity of the wilderness." Because lakes and waterways, as well as nonfederal land areas, are interlaced throughout the Canoe Area,

preservation of the area as a wilderness is greatly impaired without regulation of the use of motorized equipment on those lands and waters. The limited restrictions on motorboat and snowmobile use within the area thus constitute "needful * * * Regulations respecting * * * Property belonging to the United States" and thus are a valid exercise of the Property Clause power. See *United States* v. *Brown*, 552 F.2d 817, 822 (8th Cir.), cert. denied, 431 U.S. 949 (1977) (federal hunting restrictions applied to navigable waters within federal park); *United States* v. *Lindsey*, 595 F.2d 5 (9th Cir. 1979) (federal camping and fire-building regulations applied to land below high water mark of navigable river in national recreation area).

While, as the court below properly observed (Pet. App. B-14), *Kleppe* left open the question of the precise "scope of Congress' property clause power as applied to activity occurring off federal land[,]" it certainly cannot be said that *Kleppe* in any way overruled or narrowed the rule of *Camfield*. Thus, contrary to petitioner's contentions, the decision below did not constitute a startling extension of existing law.[7]

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[7] We do not suggest that, where regulation of activities occurring on *nonfederal* lands is concerned and that regulation is not the consequence of conditions attached to the disposition of federal property, Congress' exercise of the Property Clause power is totally "without limitations." *Kleppe* v. *New Mexico*, *supra*, 426 U.S. at 539, quoting *United States* v. *San Francisco*, 310 U.S. 16, 29 (1940). We submit simply that where federal regulation, as in *Camfield* and the present case, limits only uses of adjoining land that directly interfere with the primary use of the federal lands, the exercise of federal power is within the limits of the clause.

b. There is no merit to petitioner's contention (Pet. 9-13) that the decision below conflicts with this Court's decisions in *Kansas* v. *Colorado*, 206 U.S. 46 (1907), and *Montana* v. *United States*, 450 U.S. 544 (1981). In *Kansas* v. *Colorado*, a case concerning a dispute over Colorado's right to appropriate water from the Arkansas River that flowed through Kansas as well as Colorado, the Court rejected a claim by the United States as intervenor that it possessed a superior right under the Property Clause to legislate concerning a non-navigable portion of the Arkansas River that might be used to irrigate neighboring arid federal and nonfederal lands. 206 U.S. at 86-91. That ruling obviously does not control the present case, which concerns the regulation of boating on navigable waters, rather than the appropriation of waters from non-navigable portions of a river. See also *Kleppe* v. *New Mexico*, *supra*, 426 U.S. at 537-538. But in any event, this Court has since recognized that the Property Clause, as well as the Commerce Clause, empowers the United States "to reserve water rights for its reservations and its property." *Arizona* v. *California*, 373 U.S. 546, 597-598 (1963). Accord *Cappaert* v. *United States*, 426 U.S. 128, 138-139 (1976).

The sentence that petitioner quotes (Pet. 13) from *Montana* v. *United States*, *supra*, 450 U.S. at 551 ("The State's power over the beds of navigable waters remains subject to only one limitation: the paramount power of the United States to ensure that such waters remain free to interstate and foreign commerce") does not, in the light of other portions of that same opinion, have the broad significance attributed to it in petitioner's literal-minded reading. In *Montana* the Court rejected a claim that the Crow Tribe of Indians had power to regulate hunting and fishing by non-Indians

on non-Indian lands or waters within the reservation, but the Court assumed that Congress might, if it wished, enact a statute extending tribal hunting and fishing jurisdiction to non-Indian reservation lands (450 U.S. at 561-562); the Court also suggested that the result would have been different had it been shown that regulation of hunting and fishing by non-members on non-Indian land was "necessary to protect tribal self-government" (*id.* at 564); and it noted (*id.* at 566 n.15) that "Indian tribes retain rights to river waters necessary to make their reservations livable[,]" citing *Arizona* v. *California*, *supra*, 373 U.S. at 599.

2. Petitioner also contends (Pet. 13-14), citing *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), that the motorboat and snowmobile restrictions at issue constitute an infringement on state powers reserved under the Tenth Amendment. As the court of appeals correctly held (Pet. App. B-21 to B-25), however, petitioner's Tenth Amendment claim does not meet the standards set out in this Court's recent decision in *Hodel* v. *Virginia Surface Mining & Reclamation Association, Inc.*, No. 79-1538 (June 15, 1981). Moreover, given the unique history of the regulated area involved here, this case does not, as petitioner and Amicus National Governors' Association suggest (Pet. 15; NGA Br. 8-9), provide an appropriate vehicle for deciding whether the unlimited exercises of the Property Clause power which they hypothesize would be constitutionally permissible.

In *Hodel*, this Court announced three requirements that a Tenth Amendment challenge to legislation under the Commerce Clause must meet before it can be sustained (slip op. 21):

> First, there must be a showing that the challenged statute regulates the "States as States."

[*National League of Cities* v. *Usery*, *supra*, 426 U.S. at] 854. Second, the federal regulation must address matters that are indisputably "attributes of state sovereignty." *Id.* at 845. And third, it must be apparent that the States' compliance with the federal law would directly impair their ability "to structure integral operations in areas of traditional functions." *Id.* at 852.[29]

* * * * *

[29] Demonstrating that these three requirements are met does not, however, guarantee that a Tenth Amendment challenge to congressional commerce power action will succeed. There are situations in which the nature of the federal interest advanced may be such that it justifies State submission. See *Fry* v. *United States*, 421 U.S. 542 (1975), reaffirmed in *National League of Cities* v. *Usery*, *supra*, at 852-853 (1977). See also *id.* at 856 (Blackmun, J., concurring).

As the court of appeals correctly observed (Pet. App. B-22), the statutory restrictions at issue here apply primarily to activities of private individuals—those who wish to operate snowmobiles and high-powered motorboats within the wilderness area concerned here. Hence they "do not regulate the 'States as States'" (*ibid.*).[8] Contrary to petitioner, *Hodel* is applicable

[8] Section 4(i) of the BWCAW Act (92 Stat. 1652; Pet. App. A-7 to A-8), potentially restricts the State's administration of state-owned wilderness areas by permitting "mechanized uses in emergencies, or for the administration of the wilderness area by Federal, State, and local governmental officials or their deputies, only where the Secretary finds that such use is essential." This minimal restriction does not represent the kind of interference with policy choices that concerned the Court in *National League of Cities*. In any event, the record does

notwithstanding the State's ownership of lands and beds of navigable waters in the area affected by the regulation of the conduct concerned. In cases cited with approval on another point in *Hodel* (slip op. 22 n.30), federal statutes, such as the Clean Air Act, 42 U.S.C. (Supp. III) 7401 *et seq.*, applicable to activities on state-owned lands, have been sustained against Tenth Amendment challenges.

Moreover, as one of those cited cases suggests (*Friends of the Earth* v. *Carey*, 552 F.2d 25, 38 (2d Cir. 1977)), a challenge under *National League of Cities* has less force with respect to regulation of matters having a long history of "cooperative effort between City, State and federal authorities." In the predominantly federally-owned Canoe Area, the State has long recognized the desirability of federal regulation. As explained above (pages 4-5, *supra*), the State, in 1970, issued regulations restricting the use of motorboats to areas designated in regulations issued by the Chief of the United States Forest Service. Similarly, in 1951, after President Truman issued his proclamation excluding aircraft from the airspace below the altitude of 4,000 feet over the roadless areas that later formed the heart of the Canoe Area (Exec. Order No. 10092, 14 Fed. Reg. 7637 (1949)), the State suspended its existing air ban during the continuance of the federal ban (Pet. App. B-115).[9] Section 15 of the BWCAW Act (92

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not show that the Secretary has objected to any use of motorized equipment by State or local officials in the wilderness area, and petitioner's Tenth Amendment argument does not rest on any distinction between the use of snowmobiles and motorboats by such officials and their use by private persons.

[9] The provisions of Exec. Order No. 10092 applicable to the BWCA are deemed incorporated in Section 8 of the BWCAW Act, 92 Stat. 1654; Pet. App. A-14.

Stat. 1657-1658; Pet. App. A-20) specifically states that the Act is not to be "construed as affecting the jurisdiction or responsibilities of the State with respect to such waters except to the extent that the exercise of such jurisdiction is less stringent than the Secretary's [motorized use] regulations promulgated pursuant to this section." This limited federal restriction on state regulatory authority does not amount to an unprecedented federal intrusion into matters heretofore controlled by the State without reference to federal standards; and it is less intrusive on the State's jurisdiction over activities on navigable waters than such undeniably valid statutes as the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. 401 *et seq.* (see, *e.g.*, *Sanitary District of Chicago* v. *United States*, 266 U.S. 405, 428-429 (1925)), or the Motorboat Act of 1940, 46 U.S.C. 526 *et seq.* (see *Davis* v. *United States*, 185 F.2d 938, 940-941 (9th Cir. 1950), cert. denied, 340 U.S. 932 (1951)).

Finally, petitioner has cited no authority for its suggestion (Pet. 14) that the *Hodel* standards should not apply here because the court below sustained the challenged provisions as an exercise of Property Clause power rather than Commerce Clause power. The Property Clause is no less important to federal interests, and, as this Court noted in *Kleppe* v. *New Mexico*, *supra*, 426 U.S. at 543, quoting *Camfield* v. *United States*, *supra*, 167 U.S. at 526, to permit proper exercises of the Property Clause power to be overridden by conflicting, although otherwise valid, state regulation " 'would place the public domain of the United States completely at the mercy of state legislation.' "

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

STATE OF MINNESOTA,

Petitioner,

vs.

JOHN R. BLOCK, Individually and as Secretary of Agriculture of the United States, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF OF PETITIONER STATE OF MINNESOTA IN SUPPORT OF PETITION FOR CERTIORARI

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ARGUMENT

It is difficult to deal patiently with the series of misrepresentations of law and fact presented in the Sierra Club, et al., brief and repeated in part in the Solicitor General's brief. However, after all of their arguments have been exhausted, the fact remains that, if the BWCAW Act is constitutional, the federal government no longer needs to acquire lands and waters in order to regulate them as had always been required in the past. Under the BWCAW Act, the federal government simply declares a "federal purpose" without the bother of land acquisition—a dramatic reversal of the federal view of property clause powers, impacting primarily property owned by the State of Minnesota in its sovereign capacity. The Solicitor General's argument that this shift of power to the federal government is of limited significance because of Minnesota's history of land and water management "complementing" federal wilderness management of federal land is patronizing to the states, damaging to the constitutionally established federal system, and unworthy of the federal government.

The briefs in opposition to the petition for certiorari are based on two inconsistent and equally unfounded premises. The Sierra Club and the Solicitor General first argue that because of the "unique" facts in this case, interspersed federal and state land ownership and the history of their regulation, this case is not precedent for any other area and is of limited constitutional significance.

The absurdity of that argument is demonstrated by their second premise. They argue that this "unique" case is controlled by *Camfield v. United States*, 167 U.S. 518 (1897), and *Kleppe v. New Mexico*, 426 U.S. 529 (1976), despite the fact that both *Camfield* and *Kleppe* involve radically different facts than this case. *Camfield* barred fencing de-

signed solely to appropriate federal land to exclusive private use. *Kleppe* involved exercise of property clause power on, *not off*, federal land.

It is correct that this case is controlled by *Camfield* and the recent restatement of the *Camfield* holding in *Kleppe*. *However*, the convoluted reasoning from those two cases by the Solicitor General and the Sierra Club is totally unfounded. *Camfield* and *Kleppe*, correctly read, require reversal of the eighth circuit's decision.

1. FACTS NOT UNIQUE TO BWCAW

The Court should not be misled by the false claim that the facts in this case are unique. The pattern of intermingled state and federal ownership is not unique to the BWCAW. The same basic pattern exists in dozens of states and hundreds of areas with substantial federal ownership. The map of the Superior National Forest, attached to the Sierra Club brief, illustrates a similar federal land ownership pattern throughout much of the Forest *outside* the BWCAW. The Utah land status map, attached to Utah's amicus brief in support of the petition, provides a statewide illustration of similar land ownership patterns common to land-grant states. The amicus briefs of Washington and South Dakota describe land ownership patterns in those states. Wherever federally owned land abuts navigable waters, there is an intertwining of federal and state ownership.

The Sierra Club suggests that Minnesota's twenty-five percent ownership of the land and water surface area (thirteen percent ownership of the land alone) within the external boundaries of the BWCAW is "merely incidental" to a "uniquely federal" area. The states of Alaska and Nevada are not "uniquely federal" areas, merely because the federal government owns eighty-nine percent and eighty-six percent

of the land within the boundaries of those states. Brief of the National Governors' Association as Amicus Curiae in Support of Petition, Addendum C.

The BWCAW is unique in many ways, but it is not uniquely federal. It is, typically, partly federal. In fact, it is the state-owned waters that make the BWCAW unique.

The Solicitor General and the Sierra Club would have the Court believe that most of the waters in the BWCAW border Ontario's Quetico Provincial Park, and with it form an international nonmotorized zone. A glance at the map attached to the Sierra Club brief shows otherwise. Quetico borders only half of the BWCAW-Canadian boundary. The other half lies to the east and to the west of Quetico, and motorized use is totally unrestricted on the Canadian side of the border. Within both Quetico, and the BWCAW some motorized use is permitted.[1]

The Sierra Club also erroneously claims the federal government has a long history of regulating state lands and waters within the BWCAW, and cites the Shipstead-Nolan Act, 16 U.S.C. §§ 577-577b (1976), as an example. In fact, that act regulates neither state lands nor state waters. Section 577b merely prohibits federal agencies from issuing permits, licenses, leases or other authorizations which would result in flooding *federal lands*. Prior to the BWCAW Act, state control of the state's waters in the BWCAW was consistently recognized by the federal government:

> Control over water use on International Boundary Waters is of concern to both the U.S. and Canada. . . . Jurisdiction over surface use is shared by the State

[1]Prior to passage of the BWCAW Act, the Wilderness Act, 16 U.S.C. §§ 1131-1136 (1976), restrictions on motorboat use were the same for the BWCAW as for all other wilderness areas, contrary to the Solicitor General's and Sierra Club's assertions. *Compare* 16 U.S.C. § 1133(d)(1) (1976) *with* 16 U.S.C. § 1133(d)(5) (1976).

> of Minnesota and the Province of Ontario in Canada.
>
> Control over surface uses of the waters farther inland is vested in the State, particularly the Commissioner of Natural Resources.

U. S. Dep't. of Argiculture, Forest Service, *Boundary Waters Canoe Area Management Plan and Environmental Statement,* 136-37 (1974).

The Solicitor General properly does not argue past federal government regulation of state lands and waters, but emphasizes the state's regulation which paralleled or complemented federal regulation of the federal land. It is this "special history", the Solicitor General argues, that renders the constitutional issue in this case "of limited significance."

It is astounding that the Solicitor General should suggest that, because a state cooperates with the federal government in managing their respective property in an area of intermingled ownership, the state's constitutional power over its property is diminished in significance, and the federal government is then entitled to usurp the state's control of the state land and water.

The Solicitor General's argument is reminiscent of the railroad's argument in *Camfield,* which the Court rejected: "It seems but an ill return for the generosity of the government in granting these [rail]roads half its lands to claim that it thereby incidentally granted them the benefit of the whole." 167 U.S. at 526.

2. PRECEDENTS DO NOT SUPPORT EIGHTH CIRCUIT DECISION

2.1 *Camfield v. United States* and *Kleppe v. New Mexico*

The Solicitor General and the Sierra Club now argue that *Camfield v. United States,* 167 U.S. 518 (1897), is au-

thority not only for extending property clause powers over privately owned lands for the protection of adjacent federal lands, but is also authority for the extension of that power over any adjacent non-federal lands for the promotion of federal purposes. They base that claim on *Kleppe v. New Mexico,* 426 U.S. 529 (1979). The Sierra Club also bases it on the fact that one of the policies behind the statute challenged in *Camfield* was the settlement of public lands.

Although the eighth circuit decided this case incorrectly, it was not misled about *Camfield:*

> In *Camfield,* the Court concluded that Congress possessed the power to control conduct occuring off federal property through its "power of legislating for the protection of the public lands, though it may thereby involve the exercise of what is ordinarily known as the police power, so long as such power is directed solely to [the public lands'] own protection." *Camfield v. United States, supra,* 167 U.S. at 526, 17 S.Ct. at 867.

Minnesota by Alexander v. Block, 660 F.2d 1240, 1249 (8th Cir. 1981) (Pet. B-15) (brackets by court).

The Court itself in *Camfield,* although recognizing Congress' settlement purpose behind the statute in question, grounded its decision entirely on the protection of the federal land. The defendants were usurping the federal land by converting it to their exclusive private use.

The *Camfield* Court rejected the notion that its decision could be made on the basis of promotion of a federal purpose rather than protection of the land. The Court observed that the statute could not reach fencing having the same effect (and the same attendant frustration of the congressional settlement purposes) if the fences had been constructed for a valid private purpose and not for the purpose of usurping the federal land:

> It is no answer to say that, if such odd-numbered sections were separately fenced in, which the owner would doubtless have the right to do, the result would be the same as in this case, to practically exclude the Government from the even-numbered sections, since this was a contingency which the Government was bound to contemplate in granting away the odd-numbered sections. So long as the individual proprietor confines his enclosure to his own land, the Government has no right to complain, since he is entitled to the complete and exclusive enjoyment of it, regardless of any detriment to his neighbor; but when, under the guise of enclosing his own land, he builds a fence which is useless for that purpose, and can only have been intended to enclose the lands of the Government, he is plainly within the statute, and is guilty of an unwarrantable appropriation of that which belongs to the public at large.

167 U.S. at 527-28.

In *Leo Sheep Company v. United States*, 440 U.S. 668 (1979), the federal government claimed the right to build a road across a checkerboard pattern of federal and private land to provide access to a federally owned area used by the public for hunting and fishing. The federal government argued that *Camfield* authorized the government to construct the road across private land. The Court unanimously rejected the claim. It reaffirmed the *Camfield* Court's protection rationale, noting that the extension to private property in *Camfield* was "from the perspective of nuisance law," and quoting much of the above-quoted language from *Camfield* limiting the permissible reach of property clause power over private property. 440 U.S. at 685.

Kleppe, decided three years prior to *Leo Sheep*, does not support the broader reading of *Camfield* that the Solici-

tor General and Sierra Club now argue. In *Kleppe*, the Court specifically distinguished property clause power over federal lands from the extension of that power to private lands. It explained that the limitations on the property clause power expressed in Camfield would not apply because *Kleppe* involved federal land while *Camfield* involved private land: "Appellees mistakenly read this language to limit Congress' power to regulate activities on the public lands; in fact the quoted language [from *Camfield*] refers to the scope of congressional power to regulate conduct on *private* land that affects the public lands." 426 U.S. at 538 (emphasis by the Court). The *Kleppe* Court then stated the holding in *Camfield:* "*Camfield* holds that the Property Clause is broad enough to permit federal regulation of fences built on private land adjoining public land *when the regulation is for the protection of the federal property.*" 426 U.S. at 538 (emphasis added).[8]

2.2 *Kansas v. Colorado*

The Solicitor General attempts to distinguish *Kansas v. Colorado*, 206 U.S. 46 (1907), erroneously arguing that it involved non-navigable waters while this case involves navigable waters. Actually, no specific finding on the Arkansas River's status as a navigable water was made in that case. The federal government did assert that the river was not "practically navigable" beyond a certain point. 206

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[8] *Camfield v. United States*, 167 U.S. 518 (1897), and *United States v. Alford* 274 U.S. 264 (1927), are the only two cases in which the Court has sanctioned the exercise of the property clause power over private land. It is suggested that *McKelvey v. United States*, 260 U.S. 353 (1922), cited by the Sierra Club, Ely-Winton Boundary Waters Conservation Alliance, et al. and National Association of Property Owners involved property clause regulation on private land. It did not. The convictions upheld in *McKelvey* were for acts which occurred on federal land:

U.S. at 86. However, in deciding that the states had full jurisdiction over the bed of the Arkansas River, thus barring federal property clause regulation, the Court cited *Martin v. Lessee of Waddell*, 41 U.S. (16 Pet.) 367 (1842), and other cases on the ownership of navigable waters. 206 U.S. at 93. And in dismissing the United States' claim. the court did so without prejudice "to the rights of the United States to take such action as it shall deem necessary to preserve or improve the navigability of the Arkansas River." 206 U.S. at 116. Both points strongly indicate that the court viewed the river as navigable waters.

Essentially the Solicitor General suggests that *Kansas v. Colorado* holds that the federal government has no property clause power to control appropriation of water from nonnavigable streams, the beds of which may be owned by the riparian owners, in order to make usable one million acres of unusable federal lands. Here, the state's right to control the waters is even stronger than in the Solicitor General's version of *Kansas v. Colorado:* the waters are navigable and the state owns their beds. The federal government clearly has no property clause power to regulate their recreational use.[8]

Citing *Arizona v. California*, 373 U.S. 546 (1963), and

According to the plats of the land office, and as testified to by the register of the United States Land Office at Haley, Idaho, the land where the trouble occurred was public land not entered, and the land over which the sheep men proposed to drive the sheep was vacant and unentered public land, lying between a forest reserve and certain occupied lands in the river valley.

McKelvey v. United States, 273 F. 410, 412 (9th Cir. 1921), *aff'd*, 260 U.S. 353 (1922).

[8]The Sierra Club carelessly uses the term "navigable waters of the United States" which is not applicable to all of the navigable waters in the BWCAW. *See Hardy Salt Company v. Southern Pacific Transportation Company*, 501 F.2d 1156 (10th Cir.), *cert denied*, 419 U.S. 1033 (1974). That term relates to commerce clause powers and has no

Cappaert v. United States, 426 U.S. 128 (1976), the Solicitor General suggests that the "implied reservation of water rights" doctrine somehow limits the effect of *Kansas v. Colorado*. That doctrine protects the property rights of the federal government to unappropriated state waters in "prior appropriation" states. It is unrelated to police power regulation of state waters. In riparian rights states, such as Minnesota, the federal government's riparian rights are not subject to termination by other appropriation, and the "implied reservation of water rights" doctrine is not needed to protect those property rights.

The issue in *Kansas v. Colorado* was not the federal government's riparian right to appropriate water from the river to irrigate its own land. The issue there as here was whether, because of the federal policy for the federal lands, the federal government had police power authority under the property clause to regulate the use of the state waters. The "implied reservation of water rights" doctrine does not diminish the applicability of *Kansas v. Colorado*.

2.3 *Montana v. United States*

The Solicitor General also attacks Minnesota's reliance on the Court's recent restatement of the states' sovereign

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significance to the issue here. It does not affect the scope of the property clause power.

Both the Solicitor General and the Sierra Club acknowledge that the eighth circuit's decision is based solely on the property clause. In an effort to cloud the significance of the decision, however, both suggest that the commerce and treaty powers also may be authority for the decision.

The federal government and the Sierra Club argued both the commerce clause and the treaty power in the courts below. The eighth circuit dealt only with the property clause even though it expressly recognized that it was breaking new property clause ground. If it could have done so, it would have turned to another source of authority. The eighth circuit's decision in this case is nothing less, and nothing other, than a major, new expansion of Congress' power under the property clause.

ownership of the beds of navigable waters in *Montana v. United States*, 450 U.S. 544, 551 (1981). However, he cites the part of the opinion dealing with regulation of Indian lands, unrelated to the part on water regulation.

CONCLUSION

The National Governors' Association and twelve individual states, Alaska, Arizona, Florida, Hawaii, Louisiana, Pennsylvania, South Carolina, South Dakota, Utah, Washington, West Virginia, and Wyoming, have advised the Court that this case is of enormous national significance, that the eighth circuit's decision vastly expands the federal property clause powers beyond the intent of the Constitution and that certiorari should be granted. The petition should be granted and the eighth circuit's decision should be reversed.

February, 1982.

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Amicus Brief

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No. 81-1198

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

STATE OF MINNESOTA,

Petitioner,

vs.

JOHN R. BLOCK, Individually and as Secretary of Agriculture of the United States, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF AMICUS CURIAE STATE OF FLORIDA IN SUPPORT OF PETITION

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INTEREST OF AMICUS CURIAE

The United States of America owns substantial tracts of lands in the State of Florida. A recent publication indicates that the United States owns approximately 4,040,945 acres within the State of Florida. United States Department of the Interior, Bureau of Land Management, Public Land Statistics-1980, p. 9.

The issue here is not the extent of federal authority over those lands, but whether the jurisdiction of the United States extends by virtue of the Property Clause even beyond these holdings to lands owned by the state or its citizens and somehow associated with the federal lands.

The State of Florida's interest in maintaining its own unfettered

jurisdiction with regard to those state and private lands constitutes its interest in this case.

ARGUMENT

The State of Florida hereby joins in the Brief of Amicus Curiae State of South Dakota in Support of Petition and supports the Petition for Writ of Certiorari of the State of Minnesota.

Respectfully submitted,

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AFFIDAVIT OF SERVICE BY MAIL

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)SS
COUNTY OF LEON)

Kent A. Zaiser, being first duly sworn, deposes and says that on January 28, 1982, he served the Brief of Amicus Curiae State of Florida in Support of the Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit, of the State of Minnesota in State of Minnesota v. John R. Block, et al., United States Supreme Court, 81-1198, on each party in the court of appeals by mailing first class postage prepaid in the United States mails at Tallahassee, Florida, three copies to each of them personally or to their lawyers at their last known post office addresses as shown below:

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The Sierra Club by serving:

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Friends of the Boundary Waters Wilderness; Izaak Walton League of America, Inc.; League of Women Voters of Minnesota, Inc.; Minnesota Rovers; Wilderness Inquiry II; Minnesota Environmental Control Citizen's Association; Minneapolis Chapter of the National Audubon Society; St. Paul Chapter of the National Audubon Society; Duluth Chapter of the National Audubon Society; Minnesota Ornithologists' Union; and the Wilderness Society by serving:

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Service on the above-listed parties constitutes service on all parties to be served.

Kent A. Zaiser

Kent A. Zaiser
Assistant Attorney General

Subscribed and sworn to
before me this 28th day
of January, 1982.

Notary Public

My commission expires:

Notary Public, State of Florida at Large
My Commission Expires Sept. 27, 1982
Bonded By American Fire & Casualty Company

Amicus Brief

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IN THE

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Petitioner,
v.
JOHN R. BLOCK, Individually and as Secretary of Agriculture of the United States, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF OF THE NATIONAL GOVERNORS' ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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IN THE

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JOHN R. BLOCK, Individually and as Secretary of Agriculture of the United States, *et al.*,

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF OF THE NATIONAL GOVERNORS' ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

INTEREST OF THE *AMICUS CURIAE*

The National Governors' Association, pursuant to Rule 36.1 of the Rules of the Supreme Court of the United States, submits this brief as *amicus curiae* in support of the petition of the State of Minnesota for certiorari to review the Judgment entered by the Court of Appeals for the Eighth Circuit filed on September 30, 1981. Consent to the filing of this brief by the National Governors' Association has been granted by each of the parties, and their letters evidencing such consent are lodged in the office of the Clerk of this Court.

The National Governors' Association is incorporated in the District of Columbia and is designated as an instru-

mentality of the States. Its members are the elected heads of the fifty States, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, and the territories of the Virgin Islands, Guam and American Samoa, whose collective interests the Association represents.

The functions of the National Governors' Association, in part, are to facilitate and improve State-federal relationships and to represent vigorously the interests of the States in the federal system.

The National Governors' Association began to express its interest in the instant case and show its concern about the impact of the decision after the United States District Court for the District of Minnesota published its decision. The Legal Affairs Committee of the National Governors' Association reviewed that decision and certain pleadings and briefs from the appeal to the Circuit Court of Appeals for the Eighth Circuit. Governor Joseph E. Brennan of Maine, then Chairman of the Committee, requested on behalf of the Committee that staff of the National Governors' Association follow developments in the case in order to permit the Association to take appropriate action to participate in any appeal or petition for certiorari following the decision of the Court of Appeals. He stated that the Committee had concluded:

> . . . the case appears to involve an important constitutional question relating to the extent of federal powers under the Property Clause of the U.S. Constitution, specifically the question of the authority of the federal government to regulate the use of state waters. The outcome of this appeal may have a significant effect on federal-state relations and the division of power between the federal and state governments.[1]

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[1] See March 17, 1981 letter from Governor Joseph E. Brennan to Stephen B. Farber (Attached hereto as Addendum A).

As a consequence of Governor Brennan's request, the Executive Director of the National Governors' Association, Stephen B. Farber, requested the Clerk of the Eighth Circuit Court of Appeals to inform him of the anticipated Court schedule.[2] On December 4, 1981, the Executive Committee of the National Governors' Association authorized staff to file an *amicus curiae* brief in support of the State of Minnesota's petition for certiorari subject to the approval of the Association's Legal Affairs Committee and the Association's Energy and Environment Committee. Governor Allen I. Olson of North Dakota, now Chairman of the Legal Affairs Committee, and Governor John D. Rockefeller IV of West Virginia, Chairman of the Energy and Environment Committee, acting on behalf of their Committees, approved the filing of the *amicus* brief.

The National Governors' Association supports the maintenance of a strong federal system with the national and State governments sorting out their respective functions. The two partners can then perform their assigned roles in an exemplary fashion. Part of that sorting out process involves the national and State governments recognizing their constitutional and historic functions. This Court in *The National League of Cities v. Usery*, 426 U.S. 833, 851 (1976), recognized that providing "parks and recreation" is one of the integral functions that are well within the area of traditional operations of State and local governments. Unfortunately, the decision of the Eighth Circuit Court of Appeals prohibits the State of Minnesota from exercising its function to regulate recreational activities under the guise of protecting recreational opportunities on federal lands. We are concerned that other integral sovereign functions of States can be lost under the rationale of *Minnesota by Alexander v. Block*, 660 F.2d 1240 (8th Cir. 1981). We can imagine situations where the federal government will attempt to: a) regulate vehicular traffic

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[2] See March 18, 1981 letter from Stephen B. Farber to Robert D. St. Vrain, Clerk (Attached hereto as Addendum B).

on State lands to reduce noise around Veterans Administration hospitals, b) regulate building construction on State lands to eliminate unaesthetic views from federal lands, or c) replace local police with federal law enforcement on State lands to protect armed forces personnel in transit to and from military bases. In summary, we do not want the National Government to devour the essentials of State sovereignty. *Maryland v. Wirtz*, 392 U.S. 183, 205 (1968).

The National Governors' Association's concern about protecting the powers of the States is expressed in membership-adopted policy position B.-5 entitled "Avoiding Federal Preemption of State Laws and Policies." It reads in part:

> The Constitution assigns certain responsibilities to the federal government and reserves the balance for the states. Accordingly, the role of the federal government in areas reserved for states and local governments should be strictly limited. . . .

The National Governors' Association attempts to promote more harmonious State-federal relations. We believe that two sovereigns should work out mutually agreeable solutions to common problems. Until the passage of the Boundary Waters Canoe Area Wilderness Act (BWCAWA) in 1978, the State of Minnesota and the national government were able to complement each other's efforts to protect the Boundary Waters Canoe Area Wilderness (BWCAW), usually with the State of Minnesota taking the initiative. This is evidenced by the stipulation of facts in the instant case set forth in *National Association of Property Owners v. United States*, 499 F. Supp. 1223, 1253-59 (D. Minn. 1980). Until 1978, the national government regulated federal land while the State of Minnesota regulated its own lands and waters, and the land of its citizens. The BWCAWA changed that relationship of cooperative federalism. We are fearful that if the Eighth Circuit Court of Appeals decision is not reversed,

the national government will then be seen as having the authority to regulate the use of State lands and waters. This, in our opinion, will provide numerous opportunities for conflict. It will also lessen the availability of the combined State-federal commitment and resources that might have been available to protect both State and federal properties had a joint understanding been reached.

It is our view that the property clause of the U.S. Constitution, U.S. Const. art. IV, § 3, cl. 2, was never envisioned to provide authority for the federal government to exercise power over State-owned lands and waters or the land of a State's citizens. We are concerned that if the expansionary Constitutional interpretation of the property clause of the Eighth Circuit Court of Appeals is upheld, then it will be another example of the erosion of State powers and the concomitant accretion of authority in the national government.

The case before the Court is of major importance to the States. The amount of federally owned land is not inconsequential. The federal government as of fiscal year 1979 owned 32.477% of the acreage of States. This ranged from a high of 89.451% of Alaska to a low of .298% in Connecticut.[3] In the case of the States of Alaska, Nevada, Idaho, Utah and Oregon, the federal government owns more than fifty percent of the State land acreage. Every State has some land owned by the federal government.[4] Scores of federal agencies administer the federal property.[5] As a result of the decision be-

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[3] U.S. Department of Interior, Bureau of Land Management, *Public Land Statistics 1980*, TABLE 7—Comparison of federally owned land with total acreage of States, fiscal year 1979 (1981) (Attached hereto as Addendum C).

[4] *Ibid.*

[5] See U.S. Department of Interior, Bureau of Land Management, *Public Land Statistics 1980*, TABLE 9—Federally owned land, by agency as of fiscal year 1979 (1981).

low, State lands or waters either contained within the boundaries of a federal enclave or contiguous to one are potentially subject to federal regulation. For the five States referenced above there would be few land or water areas under the jurisdiction of the State that might not plausibly be subject to federal regulation.

It is the position of *amicus* that important elements of the States' authority to own, regulate and control their own lands and waters and to regulate lands of their citizens is jeopardized by the decision of the Eighth Circuit Court of Appeals. The issue of distribution of power between the national and State governments as to regulation of State lands has national significance. The intervention by the Sierra Club, the Izaak Walton League of America, Inc. and the Wilderness Society, all national environmental groups, and the National Association of Property Owners, headquartered in San Antonio, Texas, and the National Park Inholders Association, headquartered in Tahoe, California, two national groups, amplify the national importance of this case.

SUMMARY OF ARGUMENT

The argument may be briefly summarized as follows:

1. The issue of State control over its own lands and waters and those of its citizens is central to the design of our federal system.

2. If State lands and waters within the Boundary Waters Canoe Area Wilderness can be regulated by the federal government, then Congress might use the same legal reasoning to regulate State and private lands and State waters contiguous to other federal property which comprises almost one-third of our nation's land mass.

3. The principles of the case permit the national government to extend its control over non-fed-

eral lands without taking the property or compensating the property holders for diminished value.

4. The question of States' control over their own lands and particularly their waters is a matter of significant current controversy.

5. The Eighth Circuit Court of Appeals decision is inconsistent with the Court's holdings with regard to both the powers of the federal government under the Property Clause and the limitation of those powers under the Tenth Amendment.

ARGUMENT

The issue of whether the national government has the authority under the United States Constitution to regulate State-owned lands and waters to further the national government's purposes for national lands in the same vicinity goes to the heart of the relationship between the central government and the sovereign States. Justice Rehnquist has said: "Surely there can be no more fundamental Constitutional question than that of the intentions of the Framers of the Constitution as to how the authority should be allocated between the National and State Governments." *Fry v. United States*, 421 U.S. 542, 559 (1975). In order to resolve this issue of Constitutional significance, it is respectfully requested that this Court grant the petition for certiorari and review the decision below.

1. The decision below raises important questions about the States' control over their own lands and waters.

The Eighth Circuit Court of Appeals' opinion in this case reflects important Constitutional and policy considerations growing out of its good faith effort to interpret what it felt was a Constitutional question left open by this Court. The Eighth Circuit Court said:

> . . . we must decide the question left open in *Kleppe*—the scope of Congress' property clause power as applied to activity occurring off federal land. *Minnesota by Alexander v. Block*, 660 F.2d 1240, 1248 (8th Cir. 1981)

The Eighth Circuit Court of Appeals concluded that Congress could regulate the State and private lands and waters within the boundaries of the Boundary Waters Canoe Area Wilderness (BWCAW). The principles of this decision may have a major impact beyond the area within the BWCAW immediately affected. If the State lands and waters and private lands within the BWCAW can be regulated, then Congress might use the same rationale to exercise control over State and private lands and State waters contiguous to the BWCAW or any other federal property.

The surface area of the BWCAW is significant, consisting of approximately 1,080,300 acres of land and water. While the federal government owns three-fourths of the total, the State of Minnesota owns approximately 121,000 acres of land and the beds under the 160,000 acres of navigable water, or about one-fourth of the total, *Minnesota*, 660 F.2d at 1247. Thus, the issue is raised whether the federal government by virtue of the ownership of some land within the Congressionally designated boundaries can exercise control over all the land and water acreage within those boundaries.

The BWCAW, while large, is only one piece of property owned by the United States Government. The United States Forest Service, which administers the BWCAW, alone administers 187,508,227.2 acres throughout the country. The federal government as a whole administers 737,655,214.7 acres.[6] That total acreage represents 32.477% of the total acreage of the States.[7] By permit-

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[6] U.S. Department of the Interior, Bureau of Land Management, *Public Land Statistics 1980*, TABLE 9—Federally owned land, by agency as of fiscal year 1979 (1981), pp. 13-31.

[7] See Addendum C.

ting the federal government with such a huge landholding to exercise extraterritorial powers, this Court will condone Congress granting a massive expansion of authority to the national government. Moreover, the principles of this instant case would legitimate the federal control over non-federal land without the national government taking the property or compensating the property holders for diminished land value.

The question of a State's control over its lands and waters is not academic. Who has control of State waters is a particularly sensitive issue in the Southwest and West. Water is needed for the growing cities of the sun belt, for agriculture and for industrial development. States are constantly being challenged politically and legally on their apportionment of waters among users as well as uses. Congressional and private proposals to permit the mining of coal and the transportation of it by slurry line involve the use of vast quantities of water. These slurry line proposals have caused considerable public outcry. Concern about the availability and use of our water resources could replace energy as our leading domestic issue, at least in certain parts of our country.

Because so much of the navigable water, particularly in the West and Southwest, runs through or adjacent to federal land, the States' authority to control this navigable water will continue to be a matter of significant controversy until the question is resolved by this Court.

In the instant case, Congress required the Department of Agriculture to further the recreational uses of the federal land in question by preempting State law and regulations with regard to recreational uses of State and private land and State waters. The Congress could just as easily have furthered a different federal, or preempted a different State, land use purpose such as mining, agriculture, fishing, timber harvesting or water usage.

2. The decision below conflicts with and misinterprets previous opinions of this Court.

In *Montana v. United States*, 101 S. Ct. 1245 (1981), this Court held that the State owned the riverbed and had the authority to regulate recreational hunting and fishing. The Court said:

> [T]he ownership of land under navigable waters is an incident of sovereignty. *Martin v. Waddell*, 16 Pet. 367, 409-411, 41 U.S. 367, 409-411, 10 L.Ed. 997. As a general principle, the Federal Government holds such lands in trust for future States, to be granted to such States when they enter the Union and assume sovereignty on an "equal footing" with the established States. *Pollard's Lessee v. Hagan*, 3 How. 212, 222-223, 229, 44 U.S. 212, 222-223, 229, 11 L.Ed. 565. After a State enters the Union, title to the land is governed by state law. The State's power over the beds of navigable waters remains subject to only one limitation: the paramount power of the United States to ensure that such waters remain free to interstate and foreign commerce. 101 S. Ct. at 1251.

The opinion of the Eighth Circuit Court subjects the power of the State to the power of the United States, not to ensure the waters of the State remain free to interstate and foreign commerce, but to further the recreational experience on contiguous federal land. Thus, the Eighth Circuit Court of Appeals should have recognized the restrictive nature of the powers of the Property Clause and not interpreted the powers in the expansive way one reads the powers under the Commerce Clause.

In *Kansas v. Colorado*, 206 U.S. 46 (1907), the Court had to decide whether the United States had the right to regulate the taking of water from the Arkansas River in order for the federal government to reclaim bordering arid federal lands with water appropriated from the River. The Court concluded that the federal government

did not have the power under the Property Clause to regulate State waters. The Court said:

> . . . But clearly it (the Property Clause) does not grant to Congress any legislative control over the States, and must, so far as they are concerned, be limited to authority over the property belonging to the United States within their limits. 206 U.S. at 89 (clarification added).

The Eighth Circuit Court of Appeals felt that *Kleppe v. New Mexico*, 426 U.S. 529 (1976), limited the *Kansas v. Colorado* decision. The Eighth Circuit Court failed to realize that *Kleppe* dealt with the exercise of federal power on federal land, not on the State lands and waters beyond it. Similarly, the Eighth Circuit Court misinterpreted *Camfield v. United States*, 167 U.S. 518 (1897), and *United States v. Alford*, 274 U.S. 264 (1927), which were extensions of federal power on to private land to protect the federal land itself, not the purposes for which the federal land might be used.

Finally, the Eighth Circuit Court ignored the importance and application of the principles of *The National League of Cities v. Usery*, 426 U.S. 833 (1976), to the instant case. *The National League of Cities*, 426 U.S. at 851, recognized the States' authority to provide for the parks and recreation of their citizens. The federal restriction of certain recreational uses of State lands and waters constitutes an infringement of the States' sovereign rights protected by the Tenth Amendment to the Constitution.

CONCLUSION

The case at issue has national significance. Every State and every tract of federal land, and the purposes related thereto, are potentially affected.

The States need and are entitled to know under what circumstances, and to what extent, if any, the federal government may impose limitations on the use of States' property and the property of their citizens and interfere with integral State functions.

The decisions of this Court with regard to the Property Clause do not provide authority for the federal government to restrict recreational activities on State lands and waters. The decision of this Court with regard to the Tenth Amendment would seem to indicate that the exercise of Congressional authority in the instant case does not comport with the federal system of government embodied in the Constitution, *The National League of Cities*, 426 U.S. at 852.

The National League of Cities, 426 U.S. 853 n. 17, expressly confirms the existence of the affirmative protection afforded to the States by the Tenth Amendment, and is fully consistent with this Court's recognition of the constitutional significance of retaining the States as sovereign entities effectively operating within our federal system.[8] Justice Rehnquist, speaking for the Court in *The National League of Cities* stated:

> "While the Tenth Amendment has been characterized as a "truism," stating merely that 'all is retained that which has not been surrendered,' *United States v. Darby*, 312 U.S. 100, 124 (85 L.Ed 609, 61 S.Ct. 451, 132 ALR 1430) (1941), it is not without significance. The Amendment expressly declares the

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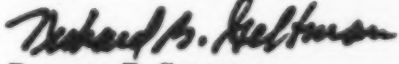
[8] *Nevada v. Hall*, 440 U.S. 410 (1979); *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975); *San Antonio School District v. Rodriguez*, 411 U.S. 1 (1973); *Younger v. Harris*, 401 U.S. 37 (1971).

constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system." *The National League of Cities*, 426 U.S. at 842, 843 (quoting from *Fry v. United States*, 421 U.S. 542, 547 n.7 (1975) (Rehnquist, J., dissenting)).

The provision of parks and recreation is typical of those services performed by State and local governments in discharging their dual functions of administering the public law and furnishing public services. Indeed, it is functions such as these which governments are created to provide, services such as these which the States have traditionally afforded their citizens. *The National League of Cities*, 426 U.S. at 851.

The National Governors' Association respectfully requests that the petition of the State of Minnesota for a writ of certiorari be granted so that the important federal questions presented may be resolved.

Respectfully submitted,



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ADDENDA

ADDENDUM A

March 17, 1981

Mr. Stephen B. Farber
Executive Director
National Governors' Association
444 North Capitol Street
Washington, D.C. 20001

Dear Steve:

I am writing to you in my capacity as Chairman of the Legal Affairs Committee of the National Governors' Association to report the conclusion and recommendations of the Committee in the case of *Minnesota v. Bergland.* The Committee has reviewed the decision of the United States District Court for the District of Minnesota. That decision is now on appeal in the Circuit Court of Appeals for the Eighth Circuit, Civil No. 80-1769. We have also reviewed certain pleadings and briefs in the case.

It is our conclusion that the case appears to involve an important constitutional question relating to the extent of federal powers under the Property Clause of the U.S. Constitution, specifically the question of the authority of the federal government to regulate the use of state waters. The outcome of this appeal may have a significant effect on federal-state relations and the division of power between the federal and state governments.

The Legal Affairs Committee recommends that the staff of the National Governors' Association make immediate inquiry of the Eighth Circuit Court of Appeals as to the anticipated schedule for hearing this case. It is further recommended that the staff follow developments in the case in order to permit the Association to take appropriate action to participate in any appeal or petition for certiorari following the decision of the Court of Appeals.

I am sending a copy of this letter to the Chairman of the Association, Governor Busbee of Georgia, so that he

is also aware of the Committee's conclusion and recommendations. Thank you very much for your assistance in this matter.

Sincerely,

/s/ Joseph E. Brennan
JOSEPH E. BRENNAN
Governor

cc: Governor George Busbee
Members of the Legal Affairs Committee
Governor Albert H. Quie

ADDENDUM B

March 18, 1981

Robert D. St. Vrain, Clerk
United States Court of Appeals
for the Eighth Circuit
U.S. Court and Custom House
1114 Market Street
St. Louis, Missouri 63101

Dear Mr. St. Vrain:

Enclosed is a copy of a report of the Legal Affairs Committee of the National Governors' Association on March 17, 1981 relating to *Minnesota v. Bergland*, Civil No. 80-1769.

I would appreciate being advised of the anticipated schedule for hearing of this case so that the Committee can continue its monitoring and review activities.

Sincerely,

/s/ Stephen B. Farber
STEPHEN B. FARBER

cc: Governor George Busbee
Governor Joseph E. Brennan
Governor George R. Ariyoshi
Governor Bruce Babbitt
Governor John N. Dalton
Governor James R. Thompson
Governor Albert H. Quie

ADDENDUM C

TABLE 7.—*Comparison of federally owned land with total acreage of States, fiscal year 1979*

State	Acreage owned by the Federal Government			Acreage not owned by Federal Government	Acreage of State[1]	Percent owned by Government[2]
	Public Domain	Acquired by other methods	Total			
Alabama	29,522.6	1,092,765.5	1,122,288.1	31,556,111.9	32,678,400	3.434
Alaska	326,891,060.8	34,499.7	326,925,560.5	38,556,039.5	365,481,600	89.451
Arizona	31,573,905.2	440,370.9	32,014,276.1	40,673,723.9	72,688,000	44.043
Arkansas	1,072,981.6	2,285,309.5	3,358,291.1	30,241,068.9	33,599,360	9.995
California	44,139,871.3	2,562,253.7	46,702,125.0	53,504,595.0	100,206,720	46.606
Colorado	22,488,937.7	1,119,008.8	23,607,946.5	42,877,813.5	66,485,760	35.508
Connecticut		9,336.9	9,336.9	3,126,023.1	3,135,360	298
Delaware		40,851.9	40,851.9	1,225,068.1	1,265,920	3.227
District of Columbia		12,829.1	12,829.1	26,210.9	39,040	32.861
Florida	370,602.1	3,670,343.1	4,040,945.2	30,680,334.8	34,721,280	11.638
Georgia		2,277,361.0	2,277,361.0	35,017,999.0	37,295,360	6.106
Hawaii	296,897.7	363,722.4	660,620.1	3,444,979.9	4,105,600	16.091
Idaho	32,945,072.4	814,499.2	33,759,571.6	19,173,548.4	52,933,120	63.778
Illinois	437.2	[illegible]159.4	606,596.6	35,188,603.4	35,795,200	1.695
Indiana	432.0	496,215.5	496,647.5	22,661,752.5	23,158,400	2.145
Iowa	340.8	227,107.5	227,448.3	35,633,031.7	35,860,480	.634
Kansas	26,093.1	706,921.6	733,014.7	51,777,705.3	52,510,720	1.396
Kentucky		1,414,350.6	1,414,350.6	24,097,969.4	25,512,320	5.544
Louisiana	25,174.4	1,073,420.7	1,098,595.1	27,769,244.9	28,867,840	3.806
Maine		134,801.6	134,801.6	19,712,878.4	19,847,680	.679
Maryland		203,009.9	203,009.9	6,116,350.1	6,319,360	3.213
Massachusetts		79,896.7	79,896.7	4,954,983.3	5,034,880	1.587
Michigan	296,442.6	3,170,933.6	3,467,376.2	33,024,783.8	36,492,160	9.502
Minnesota	1,165,764.9	2,257,239.0	3,423,003.9	47,782,756.1	51,205,760	6.685
Mississippi	2,454.1	1,728,113.4	1,730,567.5	28,492,152.5	30,222,720	5.726
Missouri	2,647.3	2,192,935.7	2,195,583.0	42,052,737.0	44,248,320	4.962
Montana	25,211,645.9	2,528,926.3	27,740,572.2	65,530,467.8	93,271,040	29.742
Nebraska	250,300.8	461,872.2	712,173.0	48,319,507.0	49,031,680	1.453
Nevada	60,269,640.9	236,473.2	60,506,114.1	9,758,205.9	70,264,320	86.112
New Hampshire		721,889.3	721,889.3	5,047,070.7	5,768,960	12.513
New Jersey		151,529.6	151,529.6	4,661,910.4	4,813,440	3.148
New Mexico	24,161,087.6	1,712,657.1	25,873,744.7	51,892,655.3	77,766,400	33.271
New York		245,915.1	245,915.1	30,435,044.9	30,680,960	.802
North Carolina		2,050,852.1	2,050,852.1	29,352,027.9	31,402,880	6.531
North Dakota	208,996.0	2,177,389.4	2,386,385.4	42,066,094.6	44,452,480	5.368
Ohio	220.0	345,088.7	345,308.7	25,876,771.3	26,222,080	1.317
Oklahoma	148,918.3	1,441,034.9	1,589,953.2	42,497,726.8	44,087,680	3.606
Oregon	30,932,776.4	1,380,911.5	32,313,687.9	29,285,032.1	61,598,720	52.458
Pennsylvania		732,565.3	732,565.3	28,071,914.7	28,804,480	2.543
Rhode Island		8,010.8	8,010.8	669,109.2	677,120	1.183
South Carolina		1,176,389.7	1,176,389.7	18,197,690.3	19,374,080	6.072
South Dakota	1,597,141.8	1,895,166.7	3,492,308.5	45,389,611.5	48,881,920	7.144
Tennessee		1,853,936.0	1,853,936.0	24,873,744.0	26,727,680	6.936
Texas		3,408,655.2	3,408,655.2	154,808,944.8	158,217,600	2.026
Utah	32,965,691.8	564,275.6	33,529,967.4	19,166,992.6	52,696,960	63.628
Vermont		295,561.9	295,561.9	5,641,078.1	5,936,640	4.979
Virginia		2,409,747.9	2,409,747.9	23,086,572.1	25,496,320	9.451
Washington	11,083,469.0	1,389,234.7	12,472,703.7	30,221,056.3	42,693,760	29.214
West Virginia		1,097,058.2	1,097,058.2	14,313,501.8	15,410,560	7.119
Wisconsin	10,143.4	1,857,591.2	1,867,734.6	33,143,465.4	35,011,200	5.335
Wyoming	29,689,575.3	639,980.2	30,329,555.5	32,013,484.5	62,343,040	48.650
Total	677,856,245.0	59,796,969.7	737,655,214.7	1,533,688,145.3	2,271,343,360	32.477

[1]Does not include inland water.
[2]Excludes trust properties.

Source: General Services Administration.

Note.—This table is repeated from the 1979 edition of *Public Land Statistics* and represents the most current data available from the General Services Administration.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 26th day of January, 1982, three copies of the brief of the National Governors' Association as *amicus curiae* in support of the petition for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit were mailed, with first-class postage prepaid, to the Solicitor General, Department of Justice, Washington, D.C. 20530; the Honorable John R. Block, Secretary of Agriculture, Independence Avenue, Between 12th and 14th Streets, S.W., Room 200A, Washington, D.C. 20250; Mr. Brian B. O'Neill, Faegre & Benson, 1300 Northwestern National Bank, Minneapolis, Minnesota 55402; Mr. Charles K. Dayton, Dayton, Herman, Graham & Getts, 930 Lumber Exchange Bldg., 10 South Fifth Street, Minneapolis, Minnesota 55401; Mr. Ben A. Wallis, Jr., 2400 Tower Life Building, San Antonio, Texas 78205; Mr. Keith Brownell, 600 Missabe Building, Duluth, Minnesota 55802; Mr. William W. Essling, Johnson, Essling, Williams, Essling and Daly, Ltd., 828 Minnesota Building, St. Paul, Minnesota 55101; Mr. Frank J. Walz, O'Connor & Hannan, 38th Floor, IDS Tower, 80 South Eighth Street, Minneapolis, Minnesota 55402; and Mr. Wayne H. Olson, 315 Peavy Building, 730 Second Avenue South, Minneapolis, Minnesota 55402.

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Office - Supreme Court, U.S.
FILED
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No. 81-1198

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

STATE OF MINNESOTA,

Petitioner,

v.

JOHN R. BLOCK, Individually and as Secretary of Agriculture of the United States, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF AMICUS CURIAE STATE OF NEVADA IN SUPPORT OF PETITION

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(1981)

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

No. 81-1198

STATE OF MINNESOTA,

Petitioner,

vs.

JOHN R. BLOCK, Individually and as Secretary of Agriculture of the United States, et al.,

Respondents.

BRIEF OF AMICUS CURIAE STATE OF NEVADA IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

QUESTIONS PRESENTED

Does the property clause of the United States Constitution authorize the federal government to regulate state owned lands and waters to further the federal purposes for federal lands in the same vicinity?

INTEREST OF AMICUS CURIAE

Federal civil and defense agencies administer 738 million acres or approximately one-third of the gross area of the United States. See Public Lands Statistics 1980, U.S. Department of The Interior 9 (1981). Added to this number are approximately 53 million acres of Indian tribal lands under the supervision of the federal government. See Bureau of the Census, Statistical Abstract of the U.S. 241 (1980 ed.). Although all states have some federally owned lands within each of their respective borders, ninety-three percent of the federal lands are located in the twelve western states (Alaska included). The western states appearing in separate amici curiae briefs are host to expansive federal acreages. Nevada, for instance, has 86.68 percent of her lands administered by federal agencies. See Nevada Statistics 1980, Bureau of Land Management 8 (1981). Not included within this figure are 1,068,000 acres of Indian

tribal lands. Federal control of lands within Nevada, therefore, exceed 88 percent.

The Eighth Circuit Court of Appeals justified its decision in part by the fact that "The United States owns close to ninety percent of the land surrounding the waters at issue." Minnesota by Alexander v. Block, 660 F.2d 1240, 1251 (1981).

Because of the extensive land based presence of the federal government within its borders, Nevada believes that the Eighth Circuit Court of Appeals decision will have an unprecedented and devastating impact upon the exercise of traditional functions of state sovereignty. Nevada's interest is in avoiding this deprivation of sovereignty. The State of Nevada thus seeks the opportunity to advise the Court of its position in opposition to the Eighth Circuit decision.

ARGUMENT IN SUPPORT OF REASONS FOR GRANTING THE WRIT

With respect to the question before the Court, Mr. Justice Holmes' advice that "upon this point a page of history is worth a volume of logic" appears particularly apropos. New York Trust Co. v. Eisner, 256 U.S. 345, 349 (1921).

This Court has recognized certain relevant historical facts important to the proper resolution of the question now before it. "For when the revolution took place, the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters and the soils under them for their own common use subject only to the rights since surrendered by the Constitution to the general government." Martin et al. v. Waddell, 16 Peters (41 U.S.) 367, 410 (1842). Following the revolution "There was no territory within the United States that was claimed in any other right than that of some one of the confederated States; therefore, there could be no acquisitions of territory made by the United States distinct from, or independent of some one of the States." Harcourt v. Gaillard, 12 Wheat (25 U.S.) 523, 526 (1827). The navigational servitude notwithstanding, nothing in the decisions of this Court have ever suggested that the people of each state have surrendered their sovereign rights to the free and unrestricted use of the navigable waters. Nor has there been any suggestion that the States have surrendered any sovereignty to protect that usage.

The historical record reflects

that seven of the original states ceded their western lands to the United States

> "upon condition that the territory so ceded shall be laid out and formed into states, . . .and that the states so formed . . . shall be republican states and admitted members of the federal union having the same rights of sovereignty, freedom, and independence, as the other states." Deed of cession of Virginia; see Pollard's Lessee v. Hagan, 3 How. (44 U.S.) 212, 221 (1845)

Thus, the original states, having assumed the role of the crown as to the sovereignty over their own lands and realizing that a confederation of states equal in all respects was essential to the harmonious operation of the union of states, assured that the new states would be on "equal footing" and this doctrine was firmly established by Congress as an integral part our national governmental institutions in the Northwest Ordinance of 1787. Equality was deemed synonymous with sovereignty. See Documents Illustrative Of The Formation Of The Union Of The American States, H.R. Doc. No. 398, 69th Cong., 1st Sess. 331, 638, 896.

Although it is not expressly mentioned in the Constitution nearly every state has been expressly guaranteed admittance on an equal footing and it is clearly recognized as part of the constitutional fabric. See e.g. Escanaba Co. v. Chicago, 107 U.S. 678, 688-689 (1883). "The 'equal footing' clause has long been held to refer to political rights and sovereignty." Stearns v. Minnesota, 179 U.S. 223, 245 (1900); see also Coyle v. Smith, 221 U.S. 559 (1911). It also includes property rights to lands submerged by navigable waters. See Pollard's Lessee v. Hagan, supra; Shively v. Bowlby, 152 U.S. 1 (1894); United Staes v. Texas, 339 U.S. 707, 716 (1950); State Land Board v. Corvallis Sand & Gravel Co., 429 U.S. 363 (1977); Montana v. United States, 450 U.S. 544 (1981).

The seminal case relative to equal footing as it applies to the question before the Court both historically and doctrinally is the case of Pollard's Lessee v. Hagan, supra. This Court's opinion noted that "this is the first time we have been called upon to draw the line that separates the sovereignty and jurisdiction of the government of the union, and the state governments. . . ." Id. at 220. The rule of law announced by the Court is as follows:

> "To give to the United States the right to transfer to a citizen the title to the shores and the soils under the navigable waters, would be placing in their hands a weapon which might be wielded greatly to the injury to state sovereignty, and deprive the states of the power to exercise a numerous and important class of police powers." Id. at 230.

The principle that provides the nexus between lands submerged by navigable waters and sovereignty was supplied by this Court in United States v. Oregon, 295 U.S. 1, 14 (1935) as follows:

> "Dominion over navigable waters and property in the soil under them are so identified with the sovereign power of government that a presumption against their separation from sovereignty must be indulged, in construing either private grants by the sovereign of the lands to be held in private ownership or transfer of sovereignty itself. See Massachusets v. New York, 271 U.S. 65, 89. For that reason, upon the admission of a State

> to the Union, the title of the United States to lands underlying navigable waters within the States passes to it, as incident to the transfer to the State of local sovereignty, and is subject only to the paramount power of the United States to control such waters for purposes of navigation in interstate and foreign commerce."

The governing constitutional principle then is not one based upon ownership by either the State or United States of these submerged lands but rather it is based upon a functional conceptualization of the state's sovereign, political powers. In the case of authority to regulate activities on navigable waters and lands submerged by navigable waters the focus of equal footing is not navigability, but sovereignty.

The error of the Eighth Circuit Court of Appeals lies in its failure to recognize the importance of Minnesota's sovereignty over its submerged lands and waters which is constitutionally required. Although the Court conceded that "as an aspect of sovereignty, the state has the power to control the use of those waters for the benefit of the public," Minnesota v.

Block, supra, at 1252, the Court incorrectly concluded that "This authority, like any other state police power, however, must yield to any valid exercise of federal power." Id.

Pollard's Lessee v. Hagan, supra, teaches that the exercise of federal authority may not "be wielded greatly to the injury of state sovereignty, and deprive the states of the power to exercise a numerous and important class of police powers." As to the submerged lands in question, this Court noted in Illinois Central Railroad v. Illinois, 146 U.S. 387, 452 (1892) that the State's title is:

> "different in character from that which the state holds in lands intended for sale. It is different from the title which the United States holds in the public lands which are open to preemption and sale. It is a title held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties."

That the people of each state are the beneficial owners of navigable waters and the soils under them cannot be gainsaid. Martin et al. v. Waddell, supra, at 410. The scope of the Constitutional powers surrendered by the people to the general government must be strictly construed when the people's right to make full use of these commons is to be restricted by the federal government's exercise of its powers. Federal regulation of such waters solely for the purpose of furthering federal purposes of federal lands in the same vicinity, has a direct and substantial impact upon the State's trust obligation to preserve navigable waters and the lands submerged by them for navigation, fishery and related public purposes. Federal regulation, in this regard, deprives the State of the power to exercise the important class of police powers recognized in Pollard's Lessee and injures sovereignty in violation of the equal footing doctrine.

This Court stated unequivocally in Montana v. United States, supra at 551 that:

> "The States power over the beds of navigable waters remains subject to only one limitation: the paramount power of the United States to ensure that such waters remain

free to interstate and foreign commerce."

The Property Clause is not a source of power over the beds of navigable waters. It "is a grant of power only over federal property." Kleppe v. New Mexico, 426 U.S. 529, 537-38 (1976).

This Court has determined that the Property Clause "does not grant to Congress any legislative control over the States, and must, so far as they are concerned, be limited to authority over the property belonging to the United States within their limits." Kansas v. Colorado, 206 U.S. 46, 89 (1907).

As noted previously, the United States did not own any land in the original states. Whatever jurisdiction it acquired over lands which it purchased within those states is derivative. As noted by this Court in Kleppe v. New Mexico, supra, at 542:

> "Congress may acquire derivative legislative power from a state pursuant to Art. I, § 8, Cl. 17, of the Constitution by consensual acquisition of land, or by non consensual acquisition followed by the State's subsequent cession of

> legislative authority over the land."

It cannot be seriously contended that the United States could acquire a Property Clause power over the beds of navigable waters in any of the original states without a cession by the state of jurisdiction and a concommittant relinquishment of the state's police power. Having no property in the original states there would be nothing to which the power might otherwise attach.

To recognize in the federal government a Property Clause power over lands submerged by navigable waters in states admitted after the original thirteen exerciable without their consent would diminish important incidents of their sovereignty in a way which would deprive them of an equal footing with the original states.

The Eighth Circuit Court of Appeals cited its holding in United States v. Brown, 552 F.2d 817, 821 (8th Cir.), cert. denied, 431 U.S. 949 (1977) for the proposition that "Congress could prohibit hunting on waters within the boundaries of the Voyagers National Park in Minnesota, even though the waters were subject to state jurisdiction." The issue in Brown, however, was one of derivative legislative jurisdiction for

as the Eighth Circuit Court noted at 821:

> "The intent of Congress, as the district court found should have been clear to the state of Minnesota. Correspondingly, the state's active participation in the creation of Voyageurs Park with the knowledge that Congress intended that hunting would be prohibited throughout the part was tantamount to a cession of jurisdiction over the lands and the waters within the park boundaries." (Emphasis added)

CONCLUSION

Nevada is justisfiably concerned with a court decision which grants federal jurisdiction to Congress to regulate activities on adjacent State lands solely for the furtherance of federal purposes on the federal lands. Virtually all of the lands owned by the State of Nevada are submerged lands bounded by federal property. If the Eighth Circuit Court of Appeals decision is left intact, it will mean that Nevada will suffer a grave impairment of her sovereignty and be deprived of an important class of police powers.

Nevada urges the Court to grant the Writ of Certiorari and review the decision of the Eighth Circuit Court of Appeals in light of the historical and Constitutional committment to a Union of States made up of free, independent, and sovereign states entitled to and possessed of all the rights of dominion and sovereignty which belong to the original States.

Respectfully submitted,

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Amicus Brief

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JOHN R. BLOCK, Individually and as Secretary of Agriculture of the United States, *et al.*,

Respondents.

ON PETITION
FOR
WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF OF AMICUS CURIAE STATE OF NORTH CAROLINA IN SUPPORT OF PETITION

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No. 81-1198

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

STATE OF MINNESOTA,

Petitioner,

v.

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BRIEF OF AMICUS CURIAE STATE OF NORTH CAROLINA IN SUPPORT OF PETITION

INTEREST OF AMICUS CURIAE

The United States of America owns substantial tracts of lands in North Carolina. A recent publication indicates that the United States owns 2,050,852.1 acres within North Carolina. United States Department of the Interior, Bureau of Land Management, *Public Land Statistics-1980,* p. 9. A substantial portion of the federally owned lands in North Carolina was donated to the United States by the State of North Carolina.

The issue here is not the extent of federal authority over those federal lands, but whether the jurisdiction of the United States extends by virtue of the Property Clause even beyond these holdings to lands owned by the state or its

citizens and somehow associated with the federal lands.

North Carolina's interest in maintaining its own unfettered jurisdiction with regard to those state and private lands constitutes its interest in this case.

ARGUMENT

The State of North Carolina joins in the "Brief of Amicus Curiae State of South Dakota in Support of Petition" and supports the Petition for Certiorari of the State of Minnesota.

January, 1982

Respectfully Submitted,

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Richard Bell, being first duly sworn, deposes and says that on January 28, 1982, he served the Brief of Amicus Curiae State of *North Carolina* in Support of the Petition for Writ of Certiorari to the United States Court of Appeals for the

Eighth Circuit, of the State of Minnesota in *State of Minnesota v. John R. Block, et al.*, United States Supreme Court, 81-1198, on each party in the court of appeals by mailing first class postage prepaid in the United States mails at Washington, D.C., three copies to each of them personally or to their lawyers at their last known post office addresses as shown below:

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Carl Brown, d/b/a/ Walleye Bait and Tackle Co.; Viking Cruises, Inc.; Concerned Citizens of Northeastern Minnesota; Boundary Waters Landowners Association, a Minnesota non-profit corporation; Koochiching County; City of South International Falls; Village of Ranier; International Falls Chamber of Commerce; and City of International Falls.	Mr. William W. Essling Johnson, Essling, Williams, Essling and Daly, Ltd. 828 Minnesota Building St. Paul, Minnesota 55101

Service on the above-listed parties constitutes service on all parties required to be served.

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Richard Bell

Subscribed and sworn to
before me this _____ day
of _____, 1982.

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Notary Public

Amicus Brief

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ON PETITION
FOR
WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF OF AMICUS CURIAE COMMONWEALTH OF PENNSYLVANIA IN SUPPORT OF PETITION

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INTEREST OF AMICUS CURIAE

The United States of America owns substantial tracts of lands in the Commonwealth of Pennsylvania. A recent publication indicates that the United States owns 732,565.3 acres within Pennsylvania. (United States Department of the Interior, Bureau of Land Management, Public Land Statistics-1980, p. 9).

The issue here is not the extent of federal authority over those federal lands, but whether the jurisdiction of the United States extends, by virtue of the Property Clause, beyond these holdings to lands owned by the state or its citizens and that are in some way associated with the federal lands.

Pennsylvania's interest in maintaining its own unfettered jurisdiction with

regard to those state and private lands constitutes its interest in this case.

ARGUMENT

The Commonwealth of Pennsylvania joins in the Brief of Amicus Curiae of the State of South Dakota in Support of Petition and supports the Petition for Certiorari of the State of Minnesota.

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Respondents.

BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Property Clause grants the Congress jurisdiction over 120,000 acres of land and 160,000 acres of the beds of navigable waters (and the waters themselves) owned by the State of Minnesota.

2. Whether, assuming the Property Clause grants such jurisdiction, the 10th Amendment (correctly interpreted in the context of a Property Clause and not a Commerce Clause question) forbids the exercise of such jurisdiction.

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BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

INTEREST OF AMICUS CURIAE

The United States of America claims ownership of vast tracts of lands in South Dakota. In

a recent publication the United States asserted ownership of 3,320,809.3 acres within South Dakota. United States Department of the Interior, Bureau of Land Management, Public Land Statistics, 1978, p. 10. (Total excludes Bureau of Interior lands, see p. 21.) Another recent federal publication states that Indian lands under the jurisdiction of the United States in South Dakota, including both tribal and individual lands held in trust and government owned land totalled 5,085,270.08 acres. United States Department of the Interior, Bureau of Indian Affairs, Annual Report Of Indian Lands As Of September 30, 1978, p. 3.

These huge federal holdings totalling over eight million acres pose a significant threat to the jurisdiction of the State of South Dakota to the extent that the federal government fully exercises its powers thereon. Yet these lands are not the issue here.

The issue here is whether the jurisdiction of the United States extends by virtue of the Property Clause even beyond these enormous holdings to lands and waters owned by the state or its citizens and somehow associated with the federal lands. (The term "owns" as used herein in regard to waters is used in its special water law sense.)

South Dakota's interest in maintaining its own unfettered jurisdiction with regard to those lands constitutes its interest.

SUMMARY OF ARGUMENT

Amicus submits simply that neither history nor precedent support a claim that the Property Clause provides for federal jurisdiction over either mere non-federal property or over property owned by one of the states of the Union. No historical basis has been established and certainly no case so holding has been cited in this litigation.

Amicus submits further that even if such power is discovered under the Property Clause, the Tenth Amendment prevents the exercise of such power. The test set out in Hodel v. Virginia Surface Mining and Reclamation Association, Inc., 101 S.Ct. 2352, 2366 (1981) to determine the permissible scope of Commerce Clause authority against a Tenth Amendment claim is argued to be inappropriately applied to a Property Clause issue. This argument is based upon the striking contrast between the scope and historical purposes of the Commerce Clause and the Property Clause. Amicus therefore suggests a new test, one derived from Hodel, which would provide for a proper allocation of power when the Property Clause is tested against a Tenth Amendment claim. The rule proposed would provide for the vindication of the Tenth Amendment when any one of the Hodel factors is present.

ARGUMENT

I.

THE PROPERTY CLAUSE DOES NOT GRANT CONGRESS JURISDICTION OVER 120,000 ACRES OF LAND AND 160,000 ACRES OF THE BEDS OF NAVIGABLE RIVERS (AND THE WATERS THEMSELVES) OWNED BY THE STATE OF MINNESOTA.

The argument of Amicus is simply that the power bestowed upon Congress by the Property Clause is not broad enough to allow the federal government to exercise the police power on 120,000 acres of land and 160,000 acres of the beds of navigable rivers, and the waters themselves, owned by the State of Minnesota.

The Property Clause states simply that Congress shall have the power to "make all needful rules and regulations respecting the territory or other property belonging to the United States . . . ." United States Constitution, Article IV, § 3, Clause 2. In the context of this clause two questions are raised. First, to what extent may non-federal property be controlled by the United

States. Second, whether and to what extent the Property Clause may operate on lands and waters owned by a state.

A. Mere Non-Federal Property

The Property Clause by its terms seems to apply only to federally owned lands; the plain meaning of the provision goes no further. Nonetheless, this Court on two occasions has held the Property Clause to extend beyond actual physical boundaries of such property.

In 1897 this Court considered whether the Property Clause provided the basis for the exercise of federal power with regard to a fence built with the purpose of cutting off access to federal property. The Court held that Congress had jurisdiction to forbid the erection of the fence in question. The fence, significantly, was apparently "erected a few inches inside the defendants' line." Camfield v. United States, 167 U.S. 518, 524 (1897). In a second case, the Supreme Court

upheld the federal law, apparently under the authority of the Property Clause, which forbade the building of a fire "near" any forest or inflammable material of the United States. This statute could properly, according to this Court, prohibit the doing of acts that "imperil the publicly owned forests." United States v. Alford, 274 U.S. 264, 267 (1927).

Thus the Property Clause has been deemed sufficiently elastic to allow legislation to forbid the building of a fence inches from federal property which cut off access to that property and to allow legislation which forbade fires near to and imperilling a national forest.

Amicus suggests that these cases constitute no basis for implying that the Property Clause provides authority to regulate activity on 280,000 acres of non-federal land and water within a single federal project in Minnesota and, moreover, to regulate that activity not to insure access or

protect the property but to carry out a congressional purpose.

The ominous nature of the federal assertion is apparent when the huge holdings of federal property in the western states are considered. The holdings of the federal government in South Dakota have already been set out. Other states are burdened with even greater federal holdings. In Utah, for example, the federal government owns 63.55 percent of all lands. U.S. Department of the Interior, Bureau of Land Management, Public Land Statistics, 1978, p. 10. If the government can under the Property Clause claim police power for the property surrounding these lands then the gap punched in the jurisdiction of South Dakota and the other western states becomes even more extensive. It is suggested that the framers of the Constitution did not intend so much and that the reach of the Property Clause, a modestly written expression of federal power, does not extend so far.

B. Interference with States As Proprietors

The claim of the United States in this case is particularly egregious because it is made against the property owned by the State of Minnesota. Neither Camfield nor Alford considered a situation in which a state was involved. Certainly neither Camfield nor Alford considered a situation in which one of the states would be subjected to federal jurisdiction on 280,000 acres of surface and submerged land and water owned by it. Given these facts, with the total lack of history or precedent supporting the exercise of jurisdiction under the Property Clause against property owned by one of the states, and given the total failure of the Eighth Circuit to come to grips with this important question, it is suggested that the issue merits review by this Court.

II

ASSUMING THE PROPERTY CLAUSE GRANTS JURISDICTION TO CONGRESS TO LEGISLATE WITH REGARD TO STATE OWNED LANDS AND WATERS, THE TENTH AMENDMENT FORBIDS THE EXERCISE OF SUCH POWER.

The argument of the State of South Dakota herein is essentially that the Eighth Circuit Court of Appeals wrongly applied the test set out in Hodel v. Virginia Surface Mining and Reclamation Association, Inc., 101 S.Ct. 2352 (1981) to a case involving the Property Clause and the Tenth Amendment. The state suggests that the test should be confined to the conflict between the Commerce Clause and the Tenth Amendment and that application of the test to every other federal power is needlessly destructive of the federal scheme.

In Hodel, 101 S.Ct. at 2366, this Court set out a precise test for determining whether a claim that "congressional commerce power legislation" is invalid under the Tenth Amendment (emphasis added). The Court found that a claim that power exercised under the Commerce Clause was invalid under the Tenth Amendment must meet each of three tests: the statute must regulate "states as

states"; the statute must address matters that are "indisputably attributes of state sovereignty"; and "it must be apparent that the states' compliance with federal law would directly impair their ability 'to structure integral operations in areas of traditional functions.'" Hodel, 101 S.Ct. at 2366. All of these factors must be present.

This holding, a potentially disastrous one for each of the states, meant that even if a state were directly impaired in its ability to structure integral operations or in its ability to carry out any or all of its traditional police powers, the Tenth Amendment would provide no protection against the Commerce Clause unless the "state qua state" were affected. Hodel leaves the possibility that Congress could effectively strip a state of substantially all of its police powers [1]

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[1] Amicus suggests that this Court substantially revise the Hodel holding even in the context of a Commerce Clause question, because it infringes so

Given the extremely expansive reading given the Commerce Clause against the Tenth Amendment it is suprising that the Eighth Circuit Court of Appeals did not consider that the same analysis may not follow with regard to the clash of another federal power, the Property Clause power, against the Tenth Amendment. Nonetheless, South Dakota would point out that the distinguishing characteristics between the powers at issue are very strong.

First, the Commerce Clause power is a plenary power, one "complete in itself" and one which "acknowledges no limitations other than those prescribed in the Constitution." Hodel, 101 S.Ct. at 2360. The sweep of power under the Commerce Clause in matters involving interstate commerce is thus extremely broad. According to

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deeply into traditionally held concepts of federalism. Failing such a revision in this case, Amicus suggests a new test, such as included in the text of this Brief, in Property Clause cases.

L. Tribe, American Constitutional Law, p. 232, "The Commerce Clause is both the chief source of congressional regulatory power and, implicitly a limitation on state legislative power." Here the power sought to be vindicated by the government is not the broad power of the Commerce Clause but rather the power of the Property Clause. That power, however extensively it may be exercised on lands owned by the federal government, see Kleppe v. New Mexico, 426 U.S. 529 (1976), may certainly not be so exercised on non-federal lands. Even the Eighth Circuit Court of Appeals in the present case admitted that "Congress has no plenary authority over conduct of non-federal land. . . ." Minnesota v. Block, 660 F.2d 1240, 1249, n.18 (8th Cir. 1981).

Thus it is notable that the Eighth Circuit simply failed to recognize that the analysis of the Tenth Amendment applied in Hodel with regard to the exercise of plenary power under the Commerce

Clause might not be appropriately applied to every other assertion of federal power under the Constitution in every other context. Or, to put it another way, it may well be that the Commerce Clause merited the special analysis given it in Hodel with regard to the Tenth Amendment because of its special position in the constitutional scheme of things, a position that might not be held by other sections of the Constitution.

In accord with this suggestion, Amicus submits that a more stringent test is appropriate with regard to the Property Clause and the Tenth Amendment when non-federal property is involved or, alternatively, when the state owned non-federal property is involved, than is appropriate when the Commerce Clause and the Tenth Amendment are at issue.

A. Mere Non-Federal Property

Amicus first suggests that when regulation of non-federal property is at issue, the Property

Clause should be deemed to yield to the demands of the Tenth Amendment when the federal regulation affects states as states, or addresses matters which are attributes of state sovereignty or when it impairs the states in their ability to structure integral functions in areas of traditional responsibility. Cf. Hodel, 101 S.Ct. at 2366. The test would require that only one of the Hodel factors be met, not all of the factors as in a Commerce Clause case.

Justification for this test can be found in the contrast between the scope and the purpose of the Commerce Clause, the Property Clause and the Tenth Amendment.

The scope of power under the Commerce Clause is quite broad, as pointed out above. The scope of that power at least arguably corresponds to its historic purpose. As succinctly stated in Stern, That Commerce Which Concerns States More Than One, 47 Harvard Law Review 1335,

1337 (1934), "The constitutional convention was called because the Articles of Confederation had not given the federal government any power to regulate commerce."

Thus, when measured against the Tenth Amendment, the Commerce Clause can be argued to justify the superior position assigned to it by the court in Hodel.[2]

No such high historical imperative, however, underlies the provision that the United States be able to make "needful rules" at least for property not owned by it. See generally the very brief discussion of the Property Clause in The Federalist No. 43, at 309, 311 (B. Wright ed. 1961). Similarly, as pointed out above, there is no judicial assertion of sweeping extraterritorial powers under the Property Clause. Thus, a rule which treats the collision of the Tenth Amendment

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[2] See Footnote 1, supra.

and the Property Clause differently than the collision of the Tenth Amendment and the Commerce Clause is appropriate.

B. State Owned Property

Amicus South Dakota would further argue that if the foregoing test for governing conflict between the Property Clause and the Tenth Amendment cannot be adopted in all cases involving non-federal land it should, at the minimum, be adopted in cases in which state owned property is involved. Thus, the test would hold that the Property Clause yields to the Tenth Amendment when state owned property is subject to impact and when a state qua state is affected or when the federal regulation addresses matters which are attributes of state sovereignty or when the federal regulation impairs a state's ability to structure integral operations in areas of traditional functions. Cf. Hodel, 101 S.Ct. at 2366.

Again the test proposes that only one of the Hodel factors be met, and not all of the factors as in a Commerce Clause case.

Justification for such a dichotomy is similar to that offered above, except that it adds to the balance the fact that a state owned property is involved. In blunt terms it is submitted that the purpose of the Property Clause was to protect federal property; the purpose of the Tenth Amendment was to protect the jurisdiction of the states. When the United States seeks to extend Property Clause power beyond its property, it reasonably should fail when confronted by the terms of the Tenth Amendment.

This view squares with the rather lean history of the Tenth Amendment which is available. Perhaps the most significant fact regarding that subject is that of all the matters included in the Bill of Rights, only the Tenth Amendment was urged by each of the eight states which demanded

the enactment of a Bill of Rights. See Swartz, The Bill of Rights, A Documentary History, Vol. 2, p. 1167. A guarantee of religious freedom was sought by only six states, of free speech three states and of a free press but five states. Swartz, supra. Thus the Tenth Amendment must have been considered a vital defense against the intrusions of the federal government into the affairs of the states which originally enacted the Constitution. To recognize the vitality of that amendment against a claim of the Property Clause would seem well within the intentions of those who originally demanded the enactment of the amendment.

CONCLUSION

Amicus South Dakota is justifiably concerned with a holding that the Property Clause grants jurisdiction to Congress over vast holdings of lands and waters owned not by the federal government but by one of the states of the Union. South Dakota urges in the alternative that either

the reach of the Property Clause is not so great or that the Tenth Amendment, enacted at the demand of state legislatures fearful of an over-expansive federal government, does not allow the exercise of such power should it be deemed to exist. South Dakota further points out that the analysis of the Eighth Circuit of the peculiar problems raised because of the involvement of state property was totally deficient and for this reason alone this case merits this Court's attention.

Amicus urges that the Writ of Certiorari be granted and that the decision of the Eighth Circuit Court of Appeals reviewed in light of the argument and the tests proposed herein be reversed.

Respectfully submitted,

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INTEREST OF AMICI CURIAE

This brief is filed by the State of Utah, joined by the states of Wyoming, Arizona, South Carolina, Hawaii, Florida, West Virginia and Louisiana, in support of the Petition for Certiorari pending in this Court in the above-referenced cause. This case involves issues going to the very heart of state sovereignty, which are of vital importance to the *amici* states, and which we urge the Court to review.

SUMMARY OF ARGUMENT

The decision of the Eighth Circuit, if allowed to stand, will extinguish or severely limit traditional notions of state sovereignty under our federal system of government, and will have a severe detrimental effect on the states' ability to exercise their proper attributes of sovereignty over state-owned lands and waters within their borders. Such a decision would have an even greater detrimental effect on the "public land" states in the west, where the United States owns vast amounts of land.

REASONS FOR GRANTING THE WRIT

I. *Authority of the States to Manage and Regulate the Lands and Waters That They Own*

The decision of the Eighth Circuit which determined that the United States, through the Property Clause, may regulate activities on sovereign state land adjoining federally owned land, goes far beyond traditional notions of federal-state sovereignty and will virtually strip the states of their traditional management and control over lands and waters held by the states in a sovereign capacity. Such decision is totally unprecedented and goes far beyond any Supreme Court decision. The detrimental ramifications of the Eighth Circuit's decision would be most felt by the western "public land" states, where the federal government owns vast tracts of land. For example, in Utah, the federal government owns approximately 67 percent of all the lands within the State. These lands are comprised of BLM lands, national forests, national parks, military and Indian reservations. Similar situations exist in other western states.

The western states, upon their respective admissions to the Union, were granted certain sections of land for the support of the public schools and other public purposes. In exchange, the states relinquished all rights of taxation and other control over retained federal lands. This resulted in a "checkerboard" configuration of state school sections within the larger tracts of federal land. The great majority of state school sections are thus totally surrounded by federal land. This is illustrated by a map of Utah prepared by the Bureau of Land Management of the United States Department of the Interior and attached hereto as Appendix A.

Perhaps one of the broadest federal intrusions into and interference with the use and management of state lands by the states will come from Section 169A of the Clean Air Act, 42 U.S.C. §7491, whereunder EPA has proposed creating "integral vistas." Under this program, the rationale is that federal Class I areas can be protected from any impairment of visibility by regulating all activities that could affect air quality for any distance from such federal areas looking outward across lands that are not owned by the United States. This would mean that if one could stand on the perimeter of a federal Class I area and look outward for a distance of 50 miles, EPA could regulate any activity that might reduce air quality visibility within the area of that "vista." A brief glance at Appendix A shows that such a program could prevent any reasonable development of much of Utah's school trust lands.

Given the checkerboard configuration of state school sections, it is possible that the federal govern-

ment, under the rationale of the Eighth Circuit's decision, could assert control over the great majority of, if not all, state-owned lands within the public land states, thus stripping the states of any viable controls over the use or development of their own land. Such conflicts have already arisen in Utah and other western states.[1]

The Eighth Circuit's rationale that regulating adjoining state land pursuant to the property clause does not regulate "states as states" is erroneous. To the contrary, the decision of the Eighth Circuit emasculates the rights of the states to control and manage their lands and waters in their sovereign capacity, and with regard to the western states, is directly contrary to the intent of the bilateral compacts between these states and the United States upon their admissions to the Union.

---

[1] See, e.g., **Utah v. Andrus, et al.**, U.S.D.C. Civil No. C-79-0037 and **United States of America v. Cotter Corporation, et al.**, U.S.D.C. Civil No. C-79-0307, wherein certain state school sections in Utah were located within a BLM wilderness study area. A state mineral lessee sought access rights over federal property—which completely surrounded the state land—in order to explore for and develop minerals. The BLM denied such access. The U.S. District Court held that the grantnig of school trust lands to the states was not a "unilateral gift," but was in the nature of a "bilateral compact" between two sovereigns. Such a grant, the court held, implied a right of reasonable access over adjoining federal land, so that the State of Utah could develop its land and realize the anticipated benefit for which the grant was made. The **Cotter** case was not appealed to the Tenth Circuit, and remains the law in Utah.

Other cases and controversies are currently pending in Utah involving BLM "river management" plans regulating boating, camping and other recreational uses on the Green, Colorado and San Juan Rivers, where the state owns the bed of such waterways. See, for example, **Utah v. United States of America, et al.**, U.S.D.C. No. C-80-0576, challenging the BLM's authority to prohibit motorized boats as part of its river management plan on the Green River in Desolation Canyon. Similar controversies exist in the other **amici** states.

Further, the Eighth Circuit's reliance on the cases of *Kleppe v. New Mexico*, 426 U.S. 529 (1976), and *Camfield v. United States*, 167 U.S. 518 (1897), and its expansion of the holdings of those cases is both misplaced and erroneous, especially in light of this Court's holding in *Montana v. United States*, 101 S.Ct. 1245 (1981).

Where will it all end? Are the states to be stripped of any and all rights to hold, manage and control their own lands and waters for public purposes as sovereign entities? Within our traditional system of federalism, reasonable limits must be drawn in such matters beyond which the United States may not stray.

II. *The Submerged Lands Act: Congressional Recognition of the Constitutional Regulatory Authority of the States Over Inland Navigable Waters*

A. Preface

Congress confirmed in the States title to the beds and shores of all inland navigable waters, including all natural resources in such lands and all resources in such waters, and recognized the States' regulatory authority over such waters, in the Submerged Lands Act, Act of May 22, 1953, c. 65, 67 Stat. 29, now codified as 43 U.S.C. §1301 *et seq.*

The Submerged Lands Act resulted from decisions of this Court which had held that coastal States did not own the marginal seabed adjacent to their shores. In order to obtain the support of the inland States, and thus

gain sufficient congressional support to enact legislation which would grant a three-mile strip of the marginal seabed to the coastal States, those States included provisions in the bill which would confirm in the inland States title to the beds and shores of inland navigable waters and recognize state regulatory authority over those waters.

The judicial and legislative history of the Submerged Lands Act is particularly significant because it demonstrates that this Court and Congress have always attached extreme importance to state ownership and regulation of the beds and shores of inland navigable waters.

The most significant aspects of the Submerged Lands Act, so far as present purposes are concerned, are that Congress (1) attached paramount importance to state ownership and control of the beds of navigable waters, and specifically confirmed in the States full proprietary ownership, including all natural resources, whether fauna, flora or mineral, within such waters or lands; (2) recognized full administrative and regulatory authority of the States over such waters and resources; and (3) recognized that state law controls such questions as accretion, reliction, erosion and avulsion. Therefore, a summary review of the judicial and legislative background of the Submerged Lands Act is well worthwhile.

B. Judicial History of Submerged Lands Act

The Submerged Lands Act was passed in response to decisions issued by this Court in what popularly are referred to as the submerged land cases: *United States*

v. California, 332 U.S. 19 (1947); *United States v. Louisiana*, 339 U.S. 699 (1950); and *United States v. Texas*, 339 U.S. 707 (1950). All three cases involved the question of whether the States owned the bed of the marginal sea (the seabed located below the tidelands). So far as relevant here, the *California* case (the first to be decided) represented a claim by the State that, since the:

> . . . original thirteen states acquired from the Crown of England title to all lands within their boundaries under navigable waters, including a three-mile belt in adjacent seas; and that since California was admitted as a state on an "equal footing" with the original states, California at that time became vested with title to all such lands. (332 U.S. at 23).

The Court rejected California's argument, pointing out that the Original States had not claimed any part of the bed of the marginal sea, but only the beds of navigable waters located within the boundaries of the States (these waters were termed "inland waters" and included tidelands as well as navigable waters not affected by the tides). Since the Original States did not claim or assert dominion over the bed of the marginal sea, the Court reasoned that California could claim no such ownership under the equal footing doctrine.

The *Louisiana* case, decided three years later, involved a similar claim by the State of Louisiana, and the Court rejected the arguments of the State, viewing its decision in the *California* case as dispositive of the question.

But the *Texas* case, decided at the same time as the *Louisiana* case, presented a somewhat different problem. Texas, as a Republic prior to statehood, had owned, both in a sovereign and proprietary capacity, the bed of the marginal sea in the Gulf of Mexico (at least to the extent of three statute miles from the shore). Thus, Texas did not claim title by virtue of the equal footing doctrine, but by prior ownership and possession, asserting that, after statehood, such ownership was subject only to the regulatory and jurisdictional powers conferred on the United States by the Constitution. It was the Government who invoked the equal footing doctrine in the *Texas* case, pointing out that if Texas owned such seabed, it would be in a better position than the other States who did not own the seabed. The Court adopted the argument of the Government, holding that the equal footing doctrine cut both ways, and declaring that Texas could not have an ownership interest in the bed of the marginal sea when the other States had no such ownership:

> The "equal footing" clause, we hold, works the same way in the converse situation presented by this case. It negatives any implied, special limitation of any of the paramount powers of the United States in favor of a State. Texas prior to her admission was a Republic. We assume that as a Republic she had not only full sovereignty over the marginal sea but ownership of it, of the land underlying it, and of all the riches which it held. In other words, we assume that it then had the *dominium* and *imperium* in and over this belt which the United States now claims. When Texas came into the Union, she became a sister State on an "equal footing" with all other States. That

> act concededly entailed a relinquishment of some of her sovereignty. The United States then took her place as respects foreign commerce, the waging of war, the making of treaties, defense of the shores, and the like. In external affairs the United States became the sole and exclusive spokesman for the Nation. We hold that as an incident to the transfer of that sovereignty any claim that Texas may have had to the marginal sea was relinquished to the United States. (330 U.S. at 717-18).

The submerged lands cases are history in the sense that Congress responded by passing the Act of May 22, 1953 (67 Stat. 29, 43 U.S.C. §1301, *et seq.*), vesting the coastal States with title to the bed of the marginal sea (three geographical miles distant from the coastline of each such State). But the submerged lands cases were fully consistent with the prior decisions of the Supreme Court relating to state ownership and regulatory control of the beds and shores of inland navigable waters. The Court simply pointed out that the Original States had never owned any part of the seabed, and as a matter of constitutional equal footing, no State could claim such seabed; and, indeed, in the case of Texas, it was necessary to take away such ownership in order to preserve constitutional equal footing.

The most fundamental observation is that, in the *California* case, the Court explained that the justification for state title to and regulatory authority over the beds of inland navigable waters was that local and state interests were of paramount importance; and that a corresponding justification for national control of the marginal seabed was that national interests were paramount. Thus:

> If this rationale of the *Pollard* case is a valid basis for a conclusion that paramount rights run to the states in inland waters to the shoreward of the low water mark, the same rationale leads to the conclusion that national interests, responsibilities, and therefore national rights are paramount in waters lying seaward in the three-mile belt. (332 U.S. at 36).

Or, again, as national interests compelled national control of the seabed,

> . . . local interests are so predominant as *constitutionally to require state dominion over lands under its land-locked navigable waters* . . . (332 U.S. at 34) (Emphasis added).

With this series of cases decided, Congress passed the Submerged Lands Act, vesting title in the coastal States to the bed of a three-mile belt of the marginal sea, and confirming the already-existing title and regulatory in the States to inland navigable waters.

C. Legislative History of Submerged Lands Act

Congressional debate over submerged lands legislation endured over an eight-year period, during which three bills were passed by Congress. The first two were vetoed by President Truman and the third became law on May 22, 1953. All three bills purported to confirm in the States title to, and regulatory authority over, all inland navigable waters and the resources therein.

The congressional history of the Submerged Lands Act is fascinating, but is not of sufficient relevance here to bear telling. It is sufficient to say that the coastal

States did not have sufficient political muscle to persuade Congress to convey to them the marginal seabed and the natural resources located therein. The oil and gas deposits were known to be of enormous value. The Supreme Court had ruled that these natural resources were federal assets.

Therefore, in order to gain support for the proposed legislation, the coastal States argued that the submerged lands cases had cast a cloud on state ownership and control of inland navigable waters, and that it was necessary to "confirm" the rights of the States in such inland waters. The gambit worked, and 45 of the then 48 States actively supported the proposed legislation.

But it annoyed the President and the Solicitor General. President Truman's second veto was based on his perception of the deceptive nature of the Act—that since the rights of the States to inland waters had never been questioned by the United States, it was deceitful for Congress to purport to protect or confirm such rights. In his veto message of May 29, 1952, the President said:

> It has been claimed that such legislation as this is necessary to protect the rights of all the States in the lands beneath their navigable inland waters. It has been argued that the decisions of the Supreme Court in the California, Louisiana, and Texas cases have somehow cast doubt on the status of lands under these inland waters. There is no truth in this at all. Nothing in these cases raises the slightest question about the ownership of lands beneath inland waters. A long and unbroken line of Supreme Court decisions, extending back for more than 100 years, holds unequiv-

> ocally that the States or their grantees own the lands beneath the navigable inland waters within the State boundaries.
>
> . . . .
>
> If the Congress wishes to enact legislation confirming the ownership of what is already theirs—that is, the lands and resources under navigable inland waters and the tidelands—I shall, of course, be glad to approve it. But such legislation is completely unnecessary, and bears no relation whatever to the question of what should be done with lands which the States do not now own—that is, the lands under the open sea. (See Senate Report No. 133, Part 2, p. 124, 83rd Cong. 1st Sess.)

The controversy continued as to whether the submerged lands cases had cast any cloud upon state ownership of tidelands and the beds of inland waters. In support of the Submerged Lands Act, the National Association of State Attorneys General prepared a memorandum brief for Congress, which was placed in the Congressional Record, and which suggested that the Supreme Court decisions in the submerged lands cases should be read as portending only a qualified state ownership of and regulatory authority over tidelands and inland waters to protect the trust of public use; but which contended that State rights had always been both in a proprietary and sovereign capacity in such waters.

United States Solicitor General Philip B. Perlman responded to the contentions of the State Attorneys General, contending that as to inland waters, there never had been and was not any question as to complete state ownership and control, and challenging the good faith of the

State Attorneys General in even raising such an argument:

> . . . The Attorneys General's pamphlet purports to prove that the decisions by the Supreme Court as to the status of the submerged lands of the marginal sea involve the title to the submerged lands of the rivers, harbors, bays, lakes, and other inland waters of the States.
>
> This is not true and never has been true. Those in charge of the quit-claim legislation know it. Part of the efforts to legitimize the trespass on Federal areas by 3 States at the expense of the other 45 States is directed to concealing the true status of submerged lands of inland waters, and to block legislation proposed by the Government to dispose permanently of baseless and frivolous contentions in which the entire pamphlet is framed. (1953 U.S. Code Cong. and Adm. News, p. 1618).

D. Language of the Submerged Lands Act

The pertinent provision of the Submerged Lands Act, now codified as 43 U.S.C. §1311(a), provides:

> It is determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and (2) *the right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State law be, and they are, subject to the provisions hereof, recognized, confirmed, established and vested in and assigned to the respective States* or the persons who were on June 5, 1950 [the date of the Supreme Court decision in the *Louisi-*

> *ana* and *Texas* cases], entitled thereto under the law of the respective States in which the land is located, and the respective grantees, lessees, or successors in interest thereof . . . (Emphasis added).

With respect to inland navigable waters, 43 U.S.C. §1301(a) provides the following definition:

> . . . all lands within the boundaries of each of the respective States which are covered by non-tidal waters that were navigable under the laws of the United States at the time such State became a member of the Union, or acquired sovereignty over such lands and waters thereafter, up to ordinary high water mark as heretofore or hereafter modified by accretion, erosion, and reliction . . . .

E. Summary

It is important to emphasize that Minnesota did not derive or acquire any regulatory rights or powers over the subject waters by virtue of the Submerged Lands Act. Those rights and powers were obtained at statehood as a constitutional necessity to place Minnesota on an "equal footing" with the Original States.

The Submerged Lands Act history highlights the fact that everyone recognized that the States had ownership and control of inland navigable waters. The rather humorous aspect is that the President and the Solicitor General seemed to be even more adamant than the States in proclaiming the unassailability of the rights of the States in inland waters.

CONCLUSION

For the foregoing reasons—coupled with the reasons set forth by Petitioner, State of Minnesota—the *amici* states respectfully pray that a writ of certiorari should issue to review the Judgment and Opinion of the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Michael M. Quealy, Assistant Attorney General of and counsel for the State of Utah, and a member of the Bar of this Court, do hereby certify that three copies of the foregoing BRIEF OF *AMICI CURIAE* STATES OF UTAH, WYOMING, ARIZONA, SOUTH CAROLINA, HAWAII, FLORIDA, WEST VIRGINIA AND LOUISIANA IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT were served upon each of the following by mailing the same, postage prepaid, this 29th day of January, 1982, all in accordance with the Rules of this Court:

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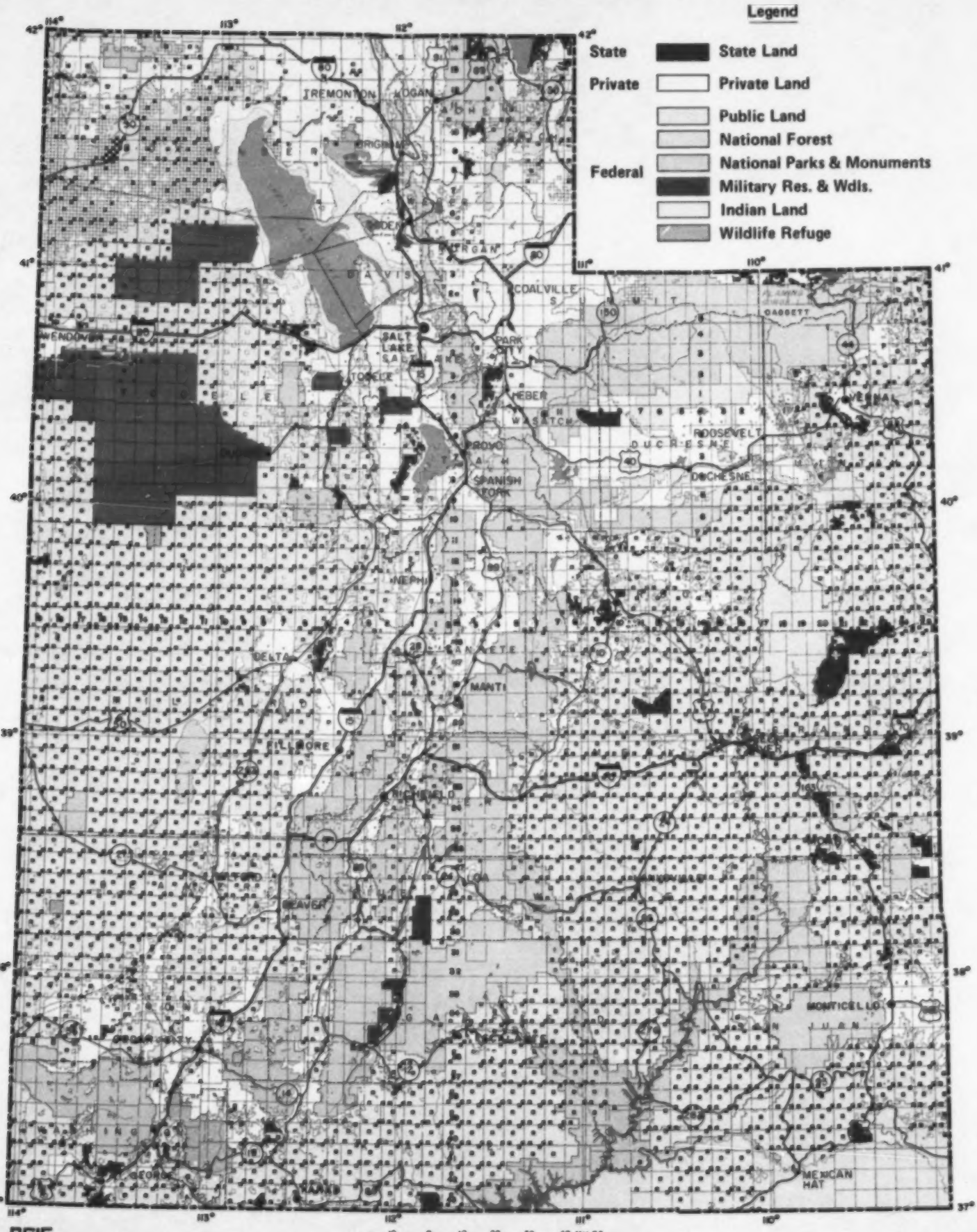

State of Utah
Division of State Lands & Forestry

Courtesy U.S. Department of Interior
Bureau of Land Management

Amicus Brief

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No. 81-1198

IN THE

SUPREME COURT

OF THE
UNITED STATES

OCTOBER TERM, 1981

STATE OF MINNESOTA,

Petitioner,

v.

JOHN R. BLOCK, Individually and as Secretary of Agriculture of the United States, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF AMICUS CURIAE STATE OF WASHINGTON IN SUPPORT OF PETITION

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QUESTION PRESENTED

Does the Property Clause of the United States Constitution authorize the Congress to impose restrictions upon the use of state-owned lands and waters merely in order to promote certain uses on both federal and state land, rather than to protect the physical or environmental integrity of the federal lands and waters themselves?

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OTHER AUTHORITIES

The Madison Papers Containing Debates On The Confederation and Constitution, page 497 (Volume V Supplementary to Elliott's Debates, published under the sanction of Congress, Washington, D.C., 1845) 5

A Profile of Washington State Uplands--Fiscal Year 1977, Volume W-5, published by the State of Washington, Department of Natural Resources. 2

Public Lands Statistics--1980, page 9, United States Department of the Interior, Bureau of Land Management. 1

INTEREST OF AMICUS CURIAE

The United States owns 12,472,703 acres within the State of Washington, or roughly 29.3% of the total land mass of the state. United States Department of the Interior, Bureau of Land Management, Public Land Statistics--1980, page 9. That ownership includes, in addition to several large and geographically significant military and Indian reservations, six large national forests, Olympic, Mount Rainier and North Cascades National Parks, and numerous smaller wildlife refuges and recreation areas. Also included within the state is the proposed Mount St. Helens National Volcanic Monument, the boundaries of which will undoubtedly encompass federal, private and state

lands.

The State of Washington owns and manages, in its sovereign capacity, 2.9 million acres of uplands within its borders. Of that figure, approximately 40,000 acres are within the exterior boundaries of the Yakima Indian Reservation; 95,000 acres are within the exterior boundaries of the various national forests; and 3,800 acres are within the exterior boundaries of the proposed Mount St. Helens National Volcanic Monument. A Profile of Washington State Uplands--Fiscal Year 1977, Volume W-5, published by the State of Washington, Department of Natural Resources. Additionally, the State of Washington owns, in its sovereign capacity, thousands of acres of tide and shorelands, thousands of

acres comprising the beds of navigable lakes, miles upon miles of the beds of navigable waters, and, most significantly, the bed of Puget Sound itself.

Many of these sovereign holdings of the State of Washington are contiguous to or somehow else related to, federal lands.

The State of Washington's interest in maintaining its sovereign jurisdiction over its lands and waters, as well as private lands contiguous or associated somehow with federal lands, constitutes its interest in this case.

REASONS FOR GRANTING THE WRIT

Amicus State of Washington joins in the Brief of Amicus Curiae State of South Dakota in Support of Petition and supports fully the submission of the

State of Minnesota in its Petition for Certiorari.

There are additional reasons for granting the writ in this case, however; reasons which constitute a further and overriding interest of the Amicus State of Washington and which should, as well, dictate this Court's interest in the controversy and its reason for granting the writ.

Transcending the State's interest in preserving its sovereign prerogatives over its own land is our (and every other state's) concern with the reasoned application of traditional concepts of federalism. The opinion of the Eighth Circuit in this case, Minnesota v. Block, 660 F.2d 1240 (Eighth Circuit, 1981), simply does not in any way embody the principles which

should govern lower courts in their approach to resolving conflicts between state and national sovereign interests such as adhere in this case.

The Eighth Circuit's opinion is grounded upon the United State's exercise of its powers under the Property Clause, U.S. Const., Art. IV, § 3, Cl. 2, and not upon any other provision of the Constitution, nor upon any other enumerated power found therein. That clause was adopted by the framers of the Constitution literally without debate. See, The Madison Papers Containing Debates On The Confederation and Constitution, page 497 (Volume V Supplementary to Elliott's Debates, published under the sanction of Congress, Washington, D.C., 1845). Not the slightest suggestion

was made by anyone in attendance at the Constitutional Convention, according to Mr. Madison's diary, that the language they were so casually approving would permit the new Congress to enact "needful regulations" over other than its own land. No mention was made that land owned by the sovereign states whose very representatives were framing this clause of the constitution was also to be within its reach.

Sound constitutional adjudication dictates that a state's ability to manage and control its own property, in the exercise of its sovereign powers, not be placed under a cloud by such a radical and remarkable extension of the Property Clause without the full plenary review and consideration by this Court. The Eighth Circuit's

treatment of this issue constitutes an astonishing application of constitutional language which was not even debated, and the implication of which, in the context of this controversy, was not even considered in passing. This Court should not make the same mistake.

CONCLUSION

This controversy is of overwhelming national significance. Its proper resolution is, and should be, of fundamental concern to each of the fifty states. The writ should be granted and the case set down for full briefing and argument on the merits.

Respectfully submitted,

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